CME Group

Kathleen M. Cronin
Managing Director
General Counsel and Corporate Secretary

September 13, 2010

VIA ELECTRONIC MAIL

Gary Gensler
Chairman
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, D.C. 20581

Re: The Board of Trade of the City of Chicago, Inc. ("CBOT") Market Regulation Advisory Notice RA0907-1

Dear Chairman Gensler:

The Board of Trade of the City of Chicago, Inc. ("CBOT") respectfully requests reconsideration of the August 13, 2010, decision in the above-referenced matter insofar as it concluded that the exchange of futures for futures ("EFF") transactions contemplated by ELX's EFF rule (i) are not wash and/or fictitious trades as defined by the Commodity Exchange Act ("CEA") and (ii) are not inconsistent with Core Principle 9 and Commission Regulation 1.38.

As discussed in response to question 1 in the attached submission, the Commission's decision departs from its precedent affirming that all matched, prearranged transactions designed to negate market risk are prohibited by the CEA, even if such transactions serve a legitimate business purpose. Additionally, the Commission's conclusion that Core Principle 9 sets forth ***examples*** of permissible non-competitive trades is inconsistent with well accepted principles of statutory construction and the Commission's own precedent. While the Commission has general power, pursuant to Section 4c of the CEA, to exempt EFFs from the prohibition on non-competitive trades, it has not exercised that authority and it is doubtful that a showing could be made to justify an exemption in favor of ELX, given its trading patterns. The interpretation that Core Principle 9 and Regulation 1.38 condemn EFFs is supported by case law as well as the Commission's reading of the same language in its Report on Exchange of Physicals (1987) (the "EFP Report"). To our knowledge, the Commission has not issued any ruling that undermines the decisions set forth in the EFP Report, nor does the Commission explain the basis for departing from such precedent.

We appreciate the Commission's reconsideration of this important matter and are available to further discuss CBOT's request should the Commission so desire.

Sincerely,

Kathleen M Cronin

Kathleen Cronin
Managing Director, General Counsel and
Corporate Secretary
The Board of Trade of the City of Chicago, Inc.

Enclosure

cc: Mr. David Stawick (Secretary)
Mr. Michael Dunn (Commissioner)
Ms. Jill Sommers (Commissioner)
Mr. Scott O'Malia (Commissioner)
Mr. Bart Chilton (Commissioner)
Mr. Dan Berkovitz (General Counsel)

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Kathleen M. Cronin
Managing Director
General Counsel and Corporate Secretary

September 13, 2010

VIA ELECTRONIC MAIL

Richard A. Shilts
Acting Director, Division of Market Oversight
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, NW
Washington, D.C. 20581

Re: The Board of Trade of the City of Chicago, Inc. ("CBOT") Market Regulation Advisory Notice RA0907-1

Dear Mr. Shilts:

CBOT hereby responds to the Commission's letter dated August 13, 2010, with respect to CBOT's Market Regulation Advisory Notice RA0907-1 (the "Advisory Notice"). For the reasons discussed below, and for the reasons stated in CBOT's submissions to the Commission on this matter dated November 16, 2009 (the "November 16 submission") and February 8, 2010 (the "February 8 submission")[1], CBOT Rule 538 ("Exchange for Related Positions") does not violate Core Principle 19 (Antitrust Considerations)[2].

Introduction

The Commission's letter of August 13, 2010, addressed to Kathleen Cronin, sets forth in detail one of several rationales for prohibiting EFFs (the "August 13 Letter"), as follows:

> Price discovery through open and competitive trading is the cornerstone of futures regulation. Hence, Section 4(a) of the [Commodity Exchange Act ("CEA")] requires that all futures and options transactions take place on the centralized marketplace. Similarly, under Commission Regulation 1.38, futures and options transactions must be executed openly and competitively; any exceptions that detract from open and competitive trading must be fully justified and approved by the Commission. The importance of promoting an "open and competitive'" means of price discovery was expressly endorsed by Congress with the addition of Core Principle 9 to the CEA. In doing so, Congress also granted DCMs reasonable discretion as to how to implement such policy in their markets. A DCM, therefore, has discretion to not permit off-centralized-market trading rules, such as EFFs, based on its market needs and customer expectations.

Core Principle 9 was indeed amended by the Dodd-Frank Act to emphasize the protection of the price discovery process and trading on the centralized market, and unlike the Exchange for Related Positions ("EFRP") rules that apply to the transactions specifically authorized by amended Core Principle

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1 CBOT hereby incorporates the entirety of it November 16 and February 8 submissions and the exhibits thereto into the instant submission.

2 All references are to the CEA as amended by The Dodd-Frank Wall Street Reform and Consumer Protection Act.

9, all of the elements of an EFF transaction can readily be executed by competitive trades conducted on regulated DCMs. Core Principle 9 provides:

(9) EXECUTION OF TRANSACTIONS.—

(A) IN GENERAL.—The board of trade shall provide a competitive, open, and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the board of trade.

(B) RULES.—The rules of the board of trade may authorize, for bona fide business purposes—
(i) transfer trades or office trades;
(ii) an exchange of—
(I) futures in connection with a cash commodity transaction;
(II) futures for cash commodities; or
(III) futures for swaps; or
(iii) a futures commission merchant, acting as principal or agent, to enter into or confirm the execution of a contract for the purchase or sale of a commodity for future delivery if the contract is reported, recorded, or cleared in accordance with the rules of the contract market or a derivatives clearing organization.

An EFF is a privately-negotiated exchange of one futures contract for a related futures contract, and the transaction, by definition, circumvents the centralized market that exists for each of the related futures contracts. ELX offers futures contracts that mimic those offered by the CBOT and it promulgated its non-competitive EFF rule to leverage the liquidity and the open interest developed by the CBOT in its contracts in order to serve its own business interests. ELX seeks to compel CBOT to adopt a corresponding EFF rule to give its own EFF rule effect; however, there is no compelling reason for the CBOT to abandon the competitive process in favor of allowing these prearranged, non-competitive and non-transparent trades that undermine the integrity of CBOT's markets.

In the case of EFPs and EFSs, Congress clearly recognized that where one component of the transaction could not be competitively executed on a regulated market, and where there was an interest in facilitating effective linkages between the regulated market and the underlying physical or over-the-counter derivative market, the regulated market could permit such transactions, subject to Commission approval, as an exception to the general principle of competitive trading. In fact, Core Principle 9 was amended by Congress less than two months ago to include a list of non-competitive trades that a board of trade *may* authorize for bona fide business purposes. This list, like the list in Commission Regulation 1.38, included EFPs and EFSs, yet in the midst of a very public debate regarding EFFs, Congress chose not to add EFFs to that list. The inference to be drawn clearly is that this omission was intentional.

The CEA is also clear that a Designated Contract Market is not required to justify its refusal to permit a species of non-competitive trading. Nothing in the CEA requires a DCM to permit non-competitive, off-exchange trading and nothing in the CEA suggests that a DCM, by permitting one type of non-competitive trade, must open its market without discrimination to every type of non-competitive trade. The demand that CBOT justify its refusal to permit a form of non-competitive trading, particularly one that can easily be accomplished through legitimate competitive means, is entirely misplaced and contrary to the core principles of the CEA. Nevertheless, we will explain why CBOT's decision not to adopt a rule permitting EFFs is fully consistent with the CEA and Core Principle 19.

1. **Please identify each legal, economic and business rationale for prohibiting EFFs. Please include a detailed explanation for your assertion that: (a) permitting EFFs would enable ELX to free ride on CBOT's investments in exchange facilities, clearing facilities or product development; and (b) CBOT's EFF prohibition contributes to inter-exchange competition.**

I. Economic/Business Rationale

Liquidity is the result of investment by exchanges in developing products, trading and clearing infrastructures, and a regulatory regime that attract market participants. Market participants who choose to transact on CBOT obtain the benefit of CBOT's liquidity, trading technology, clearing services and regulatory integrity, and the broader market benefits from the efficient price discovery that CBOT's liquidity yields. CBOT market participants rely on this framework of liquidity, transparency and integrity, and it is their confidence in that framework that sustains CBOT's business. As discussed in more detail below, requiring an exchange to permit EFFs facilitates free riding by competing exchanges and undermines an exchange's ability to establish effectual rules to promote market integrity.

A. Compelled EFFs Enable ELX to "Free-Ride" on CBOT's Pool of Liquidity and Open Interest

Futures exchanges compete to attract liquidity and open interest. Futures markets are classic "two-sided" markets, and exchanges compete to attract both liquidity providers (such as market makers) and end-users (such as hedgers). Exchanges invest in developing contracts and creating a trading environment attractive to both sets of market participants. This environment encompasses a variety of dimensions, including liquidity as well as the development of trading platforms, trade processing services, clearing services, and the promulgation of rules and procedures that promote well-informed confidence among traders.

For successful contracts, a "virtuous circle" is created in which an exchange succeeds in attracting market participants and liquidity. This, in turn, lowers trading costs by reducing bid-ask spreads and increasing market depth, which in turn attracts additional market participants and liquidity. It is widely recognized that liquidity costs are the primary component of transaction costs borne by market participants and that exchange and clearing fees set by exchanges typically account for a small portion of overall trading costs for futures.[3]

The futures industry is "hit driven," with most exchange volume and revenue generated by a relatively small number of listed contracts. Exchanges develop, launch and promote a wide variety of new contracts each year, but only a few of these generate significant volume. For example, between 2005 and 2009, CME Group exchanges (including CME, CBOT, NYMEX and COMEX) introduced more than 450 contracts which were still traded in 2009. In 2009, more than 580 contracts were listed for trading on CME Group exchanges, but only five families of contracts (S&P Indexes, Eurodollars, Treasuries, Crude Oil, and NASDAQ Indexes) accounted for more than 70 percent of total volume.

Mandating acceptance of EFFs by CBOT enables ELX and other exchanges to "free ride" on past investments by CBOT and liquidity providers in successfully establishing a highly liquid market for Treasury futures. At the same time, and as discussed more fully in the next section, the ability of ELX and its traders to free-ride on CBOT's past investments through compelled CBOT acceptance of EFFs

3 Goldman Sachs, "Futures & Swaps: United States," April 4, 2002.

makes trading on ELX more attractive to traders by enabling them to enter or exit positions on ELX without having to rely on ELX's own liquidity pool to do so.

This logic applies to any successful futures contract. Compulsory EFFs facilitate the ability of rival exchanges to challenge any contract that generates significant liquidity by free riding on the efforts of exchanges in developing successful new contracts. Thus, compelling exchanges to participate in EFF transactions harms their incentives to undertake the inherently risky investment that is required to develop new contracts because of the increased likelihood that they will be required to share the rewards of these efforts with rival exchanges which have not made similar investments in developing the contracts. This not only undermines exchanges' incentive to innovate, but also can harm exchanges' ability to invest in maintaining and improving ancillary services such as trading platforms and trade processing services.

B. Compelled EFFs Subsidize Trading on ELX by Providing Traders the Ability to Move Open Interest to and from CBOT

Compelling CBOT to accept EFFs provides ELX traders the ability to "put" their open interest to CBOT or move their open interest from CBOT to ELX. This option is of value to ELX as it enables market participants to avoid potentially high costs of entering or exiting ELX positions. Clearly, CBOT has invested significantly to build liquidity in its contracts and the fruit of that investment is the legitimate competitive advantage its greater and more consistent liquidity affords. ELX has attracted less significant, less diverse and less consistent liquidity and therefore the liquidity costs to its customers are greater, particularly for large size orders or during periods of market stress when bid/ask spreads on ELX widen as traders withdraw their bids and offers. Requiring CBOT to accept EFFs effectively allows ELX traders to leverage the liquidity developed by CBOT without providing acceptable compensation to CBOT, while also harming CBOT markets and subverting a critical element of competition among exchanges.

For example, liquidity for ELX's 30-year Treasury futures contract vanished during the May 6, 2010 "flash crash." The bid/ask spread at ELX on this instrument typically ranges between 0.5 and 1 (32nds of 1% of the notional value of the contract). However, between 1:50 pm and 2:10 pm CDT on May 6, only a handful of bids or offers were recorded for ELX's 30-year Treasury futures contract. The bid/ask spread exploded to 59 32nds. CBOT bid/ask spreads on the same contract were unchanged at the minimum tick increment during that period.

Similar, albeit less dramatic, patterns are observed in the minutes surrounding the release of government data, which reflect much more limited periods of market stress. CME Group analyzed the best bid/offer spread around six economic announcements in January 2010. Examples of these announcements include the release of employment data and the results of Treasury auctions. As shown in Figure 2, the best bid/offer spread is typically similar at CBOT and ELX during "non-stress" trading periods. However, in the minutes surrounding these announcements, the bid/ask spread on ELX increased substantially, while the CBOT spread increased marginally.

Figure 1

Best Bid/Offer Spread Near Six Economic Announcements in January 2010
(fractions of 1/32 of one point)

	Not Near Announcements		Near Announcements	
	ELX	CBOT	ELX	CBOT
2-Year Note	0.26	0.26	0.52	0.29
5-Year Note	0.29	0.27	0.60	0.36
10-Year Note	0.66	0.51	1.31	0.55
Bond[4]	0.60	1.02	0.78	1.09
Long-Term Bond	2.90	1.51	10.40	1.96

C. Compelled EFFs Undermine Exchanges' Ability to Establish Rules Promoting Market Integrity and Liquidity

Another dimension of competition between exchanges is the establishment of rules and procedures that attract market participants by fostering liquidity and promoting market integrity confidence. Rules must be designed to attract both liquidity providers and end-users and to balance their sometimes competing interests.

Compelled EFFs clearly undermine CBOT's ability to establish effectual rules designed to promote market integrity and transparency because traders can easily circumvent the CBOT's rules by executing on ELX pursuant to its rules, and then moving the positions to CBOT via an EFF or vice versa. ELX's rules are substantially more liberal than CBOT's in their allowance for prearranged, non-competitive and off-exchange trading. Compelling CBOT to adopt EFFs effectively subjects CBOT markets to ELX's rules even if CBOT maintains its own distinct set of rules that it believes best support market integrity, transparency and liquidity.

1. *Block Trade Rules*

Exchanges' block trade rules attempt to balance the competing goals of (i) limiting both the transaction costs faced by market participants who undertake large transactions and the market impact associated with such transactions, (ii) promoting competitive execution and price transparency and (iii) attracting liquidity providers. Block trade prices are not reported as promptly as prices of transactions completed on the competitive exchange platform, and consequently block trades exhibit less price transparency. In addition, because block trades are privately negotiated away from the centralized market, competition for such trades is not open. Liquidity providers may be less inclined to post resting bids and offers in the centralized market, if those bids and offers are routinely picked off by the parties to block trades that are conducted non-transparently, outside the central marketplace.

CBOT balances these competing interests by permitting block trades only for transactions involving 5000 or more contracts in 2-, 3-, 5-, and 10-Year Treasury Note futures and 3000 or more

4 CBOT's tick size is 1/32; ELX's tick size is one half of 1/32.

contracts in Treasury Bond and Long-Term Treasury Bond futures during regular trading hours. ELX sets substantially less restrictive thresholds, permitting block trades for transactions involving 1000 or more contracts in its Treasury Note futures and 500 or more contracts in its Treasury Bond futures. Additionally, unlike ELX, CBOT does not permit block trades in Treasury calendar spreads. ELX also allows for the parties to a block trade to report the transaction up to 15 minutes after its execution, in contrast to the CBOT's 5-minute reporting deadline during regular trading hours. ELX prominently promotes its less restrictive block trade rules on the home page of its website.[5]

Exchanges are free to establish block trade rules that are deemed to be consistent with the relevant Core Principles and Commission regulations and in a manner that each exchange believes best promotes confidence in the integrity and liquidity of its markets. As explained in our prior submissions, if CBOT is compelled to accept EFFs, its rules lose effect. EFFs create a mechanism that enables traders to circumvent CBOT's block trade thresholds, calendar spread prohibitions, and reporting requirements by allowing traders to establish positions on ELX via ELXs less restrictive rules and then to convert them to CBOT positions, either for initiation or offset, via noncompetitive and non-transparent EFF trades. Compelling CBOT to accept EFFs therefore completely undermines the CBOT's self-regulatory mandate as it must accept trades that circumvent its rules and potentially harm the integrity and liquidity of its markets.

2. *Rules Regarding Pre-Execution Communications*

Exchanges also set rules that prohibit or limit a broker's ability to engage in "pre-execution communications" and to thereby direct trades to affiliated traders or market makers. These rules are designed to strike a balance between promoting competition and transparency, on one hand, while providing brokers appropriate latitude to source liquidity for their clients, on the other. The rules regarding pre-execution communications, where permitted, are often structured to limit the ability of a broker to take the opposite side of a customer order for the broker's own benefit, or for the benefit of a market maker paying commissions for the opportunity to trade against the broker's order flow, without first exposing the order to the broader market for a minimum prescribed period of time.

CBOT and ELX impose substantially different obligations on market participants with respect to pre-execution communications. Under CBOT rules, pre-execution communications are prohibited in all futures contracts, meaning that order information must be openly disclosed to the public market and that solicitations of interest must take place via a Request for Quote that is simultaneously disseminated to the entire market. By contrast, ELX allows pre-execution communications in all of its contracts before an order is exposed to the market, and following the pre-trade negotiations the broker can choose to expose *either* the initiating bid/offer *or* the responsive offer/bid for the required 5 seconds before entering the opposing order[6]. Thus, ELX's rules favor facilitation of the prearranged crossing of trades, whereas CBOT's rules are designed to favor market transparency and promote open and competitive execution.

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5 *Lower Block Trade Thresholds*, ELX Futures, http://www.elxfutures.com/ (last visited Sept. 9, 2010).

6 At CME Group exchanges other than CBOT, pre-execution communications are permitted in futures. However, in these cases, the initiating order must be entered first and exposed for five seconds before the responsive order can be entered. Thus, ELX's rule permitting either the initiating or responsive side to be exposed first effectively allows the broker to expose the less attractive of the two sides first, thereby increasing the probability that the initiating order and the responsive order can be crossed.

These rule differences, by themselves, create no necessary competitive concerns, assuming that each exchange's rules are in compliance with the CEA and relevant Core Principles. If so, they simply exemplify the different value propositions offered by competing exchanges. However, if CBOT were compelled to accept EFFs, traders could cross trades on ELX in a manner inconsistent with CBOT rules and then move those positions to CBOT via EFFs, thereby allowing them to establish CBOT positions in a manner that would otherwise contravene CBOT's rules. Again, it appears clear that compelling CBOT to accept EFFs undermines CBOT's ability to establish and enforce rules that effectively promote competition, transparency, integrity and liquidity in its markets.

II. Legal Rationale

A. CBOT's Long-Standing Resistance To Non-Competitive Trading Does Not Violate Core Principle 19

As discussed in CBOT's prior submissions on this matter, Core Principle 19 specifically invokes "antitrust" law in its title and text and provides:

"***Antitrust Considerations*** –

> Unless necessary or appropriate to achieve the purposes of this chapter, the board of trade shall endeavor to avoid:
> (A) adopting any rules or taking any actions that result in any unreasonable restraints of trade; or
> (B) imposing any material anticompetitive burden on trading on the contract market." (emphasis added.)

Indeed, the plain language of Core Principle 19 makes clear that where a contract market takes appropriate action to achieve the purposes of the CEA, the contract market's actions shall not be evaluated for antitrust concerns. As explained in our prior submission and as discussed in detail below, CBOT Rule 538's prohibition on EFFs is appropriate for achieving several purposes of the CEA, including protecting liquidity, competition and price discovery in CBOT's Treasury futures complex and fulfilling CBOT's self-regulatory obligations. However, even if CBOT's actions were not deemed appropriate for achieving any purposes of the CEA, well-established precedent makes clear that CBOT Rule 538 is not an unreasonable restraint of trade.

Generally stated purposes of the CEA include, *inter alia*, to deter and prevent price manipulation or any other disruptions to market integrity" and to "promote responsible innovation and fair competition among boards of trade." (7 U.S.C. §5). More specifically, Core Principle 9, which was amended less than 60 days ago, obligates boards of trade, including CBOT and ELX, to provide "a competitive, open, and efficient market and mechanism for executing transactions *that protects the price discovery process of trading in the centralized market of the board of trade,* 7 U.S.C. § 5(d)(9) (emphasis added), and Section 4c prohibits wash and/or fictitious sales (7 U.S.C. § 6c).

The CEA prohibits wash and fictitious sales. In its August 13 Letter, the Commission has asserted that an EFF "used to move positions from one exchange to another exchange with a different clearing house" is not a wash sale because it does not involve the "same futures contract." The Commission further asserts that because the ELX and CBOT contracts are not "offsetting or fungible" they do not involve the "same futures contract." CBOT respectfully maintains that the EFFs proposed by ELX are wash sales and asserts that the Commission's position as reflected in its August 13 Letter represents a significant departure from its precedent without any justification.

The basis for the Commission's assertion that the ELX contracts and the CBOT contracts are not the "same" is that the respective contracts are not fungible. (August 13 Letter at 4.) The Commission, however, cites to no precedent to support its conclusion that the "same" means "fungible."[7] Indeed, there is nothing in Commission precedent respecting fungibility nor is there any discussion in any Commission or court decision suggesting that fungibility is a necessary element of a wash trade. By ELX's own characterization, the relevant contracts are the "same" because they are "identical." (Rule Filing at 1.) The Commission's August 13 Letter overlooks this admission by ELX. Moreover, a comparison of the material terms and conditions of the respective CBOT and ELX Treasury futures contracts illustrates that the instruments are the same. The fact that the instruments are cleared by different clearing houses does not render the instruments different.

Furthermore, despite the Commission focus on the alleged requirement that the contracts be the "same", precedent makes clear that the centerpiece of a wash sale analysis is whether there is evidence demonstrating that the customer intended to negate market risk or price competition. *See, e.g., In re Piasio,* [1999-2000 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 28,276 at 50,685 (CFTC Sep. 29, 2000). Indeed, every wash trade case with which we are familiar arises from negated *market* risk. *See, e.g., In re CIC Banque Credit Industriel D'Alsace et de Lorraine Societe Anonyme*, [2007-2009 Transfer Binder] Comm. Fut. L. Rep. (CCH) 30,675 (CFTC Sept. 27, 2007) ("Negated risk is not, the equivalent of no risk or the complete elimination of risk" ; rather the Commission has clearly held that risk is negated whenever it is "reduced to a level that has no practical impact on the transactions at issue.") (citation omitted). Market risk or price competition is negated "when it is reduced to a level that has no practical impact on the transactions at issue.") *In re Gimbel,* [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,213 at 35,004 n.7 (CFTC Apr. 14, 1998), *aff'd as to liability,* 872 F.2d 196 (7th Cir. 1989).

Here, there can be no question that the EFF contemplated by ELX's EFF rule is intended to negate the market risk of selling at ELX and simultaneously buying at CBOT or vice versa. Nowhere in any of ELX's submissions or in the Commission's August 13 Letter to CBOT is there a discussion of any purported market risk involved in these transactions. To the extent that ELX and/or the Commission are equating counterparty risk with market risk, that substitution must be rejected. As explained in CBOT's February 8 submission, although the EFF contemplated by ELX's rule may involve some theoretical, unquantifiable change in *counterparty* risk, there is no acceptance of *market risk*.

To argue otherwise would require the Commission to permit two traders with opposite positions at CBOT to do an EFS transaction on one day to eliminate their futures positions and replace them with a swap, and also simultaneously prearrange to restore the futures positions the next day at the same price via a second EFS trade. In this example, the parties substitute CCP risk for counterparty risk on day one and, upon execution of the second EFS the next day, eliminate counterparty risk and reinsert the CCP risk. To be clear, under the rationale set forth in the Commission's August 13 Letter, such prearranged and contingent EFS transactions that involved no market risk would not be a wash trade because the counterparty risk changed each time an EFS was completed, if only for a day. In other words, the switch from clearinghouse risk to counterparty risk is exactly the same under the Commission's rationale as the switch from clearinghouse A to clearinghouse B.

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7 Notwithstanding the foregoing, if EFF transactions are permitted between ELX and CBOT Treasury futures contracts, a long position existing at CBOT and a short position existing at ELX can be netted to zero via an EFF transaction.

That the purpose of ELX's EFF rule is to facilitate moving positions between clearinghouses without market risk or to offset positions without market risk does not excuse the trades from the wash sales prohibition under Commission precedent. As discussed in our February 8 submission, judicial and administrative authority has been clear and consistent: A purported business motive does not excuse a wash trade. The motive of the trader is not relevant to a wash trade inquiry, and all of the Commission's statements regarding the legal principles governing wash trade cases that we have been able to find consistently maintain that principle.

In *In the Matter of Olam Int'l Ltd,* CFTC Docket No. 04-13 (April 15, 2004), the customer explained that it had a legitimate commercial purpose, offsetting positions that were held at different clearing firms, for its transaction. Moreover, the customer seemed to have had a legitimate alternative means to accomplish its goal, which it failed to pursue out of ignorance. The Commission refused to accept that defense and reiterated its view of the legal standard as follows:

> Section 4c(a) of the Act makes it "unlawful for any person to offer to enter into, enter into, or confirm the execution of a transaction" that "is of the character of, or is commonly known to the trade as, a 'wash sale' ...." The central characteristic of a wash sale is the intent to avoid making a *bona fide* transaction or taking a *bona fide* market position. *In re Citadel Trading Co. of Chicago, Ltd.*, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) 23,082 at 32,190 (CFTC May 12, 1986).

Further, the Commission in a recently settled enforcement action, underscored that CBOT's position on this matter is consistent with Commission precedent and current practice. *In re Pinemore, L.P. and Birchmore, L.P.*, (January 28, 2010), the CFTC targeted market participants who entered offsetting orders in natural gas futures contracts in a manner designed to minimize "slippage," or price difference, between their various holdings as a means of pursing an otherwise lawful goal. The Commission assigned no importance to these facts; its sole concern was whether the trades "negated the risk incident to the market and produced a financial nullity." If the Commission now adopts the position that EFFs are not wash trades because they do not have an otherwise unlawful purpose, then it would be required to prove an unlawful motive in wash trade cases and negate the basis for its series of high visibility prosecutions of energy traders in recent years.

With respect to their degree of exposure to market risk, the trades cited in *In re. Pinemore L.P.* arguably had greater market risk than ELX's proposed EFF transactions as the orders were at least ostensibly exposed to the market, price reported and partially executed at different prices. Clearly, there is nothing to preclude the components of the EFF from being competitively executed in the open market at each exchange. Although market participants may occasionally wish to enter such non-competitive, null trades solely in order to shift their holdings from one exchange to another, this objective does not alter the fact that any such EFF transaction would negate market risk and price competition and undermine the integrity of the market's price-discovery function.

Although we have been unable to find a case with the precise set of facts presented by the instant matter (and neither the Commission nor ELX have cited to one), the most factually analogous cases decided by the Commission involve wash sales effectuated by the use of two different trading systems and/or those which involved transactions that negated market risk but otherwise were effectuated for legitimate business purposes. As discussed in our February 8 submission, the Commission has prosecuted and obtained significant settlements from market participants who allegedly committed a wash sale violation by negating market risk by entering transactions on an electronic trading facility and offsetting those transactions in the over-the-counter market, *see, e.g., In the Matter of Byron G. Biggs,* CFTC Docket No. 04-22 (August 11, 2004); *In the Matter of Joseph B. Knauth, Jr.,* CFTC Docket No. 04-15 (May 10, 2004), and from market participants who entered transactions that negated market risk even though they otherwise had legitimate business purposes, *see, e.g., In re Pinemore, supra.* These matters unquestionably are more analogous to instant matter than *In re Gilchrist*, which was cited by Commission as controlling.

Specifically, in *In re Gilchrist*, Comm. Fut. L. Rep. (CCH) ¶ 24,993 at 37,653 (Jan. 25, 1991), the contracts alleged to have resulted in a financial nullity did not have virtually identical terms and conditions, as do the contracts at issue here. In fact, the contracts at issue in *In re Gilchrist* did not even involve the same underlying commodity. Instead, the alleged wash sale there involved transactions in a Gold contract that were offset by profits in contracts involving a contract referencing a different underlying commodity - Swiss Francs, Treasury Bills or Eurodollars. Thus, even assuming that the relevant CBOT and ELX Treasury futures contracts were not the "same" within the meaning of Commission precedent (which they are), *In re Gilchrist* is not controlling here. Accordingly, contrary to the Commission's assertion in its August 13 Letter, CBOT's reliance on the foregoing cases, as well as those cited in its previous submissions, is not misplaced.

The second purpose of the CEA that CBOT Rule 538 is appropriate to achieve is CBOT's obligation to enforce its own rules. Core Principle 2 requires that a board of trade "establish, monitor, and enforce compliance with the rules of the contract market . . . . [and] apply appropriate sanctions to any person that violates *any* rule of the contract market." 7 U.S.C. § 5(d)(2). In addition to the prohibition against wash sales in CEA Section 4c, as noted in our February 8 submission, CBOT Rule 534, which was submitted to and approved by the Commission, prohibits wash sales. CBOT Rule 534 is specific as to the type of transaction that constitutes a wash sale thereunder, and makes very clear that a transaction intended to avoid a bona fide market position exposed to market risk is the centerpiece of a wash sale on CBOT:

> No person shall place for the same beneficial owner buy and sell orders for the same product and expiration month, and, for a put or call option, the same strike price, at or about the same time *with the intent to avoid a bona fide market position exposed to market risk* (transactions commonly known or referred to as wash sales). Buy and sell orders placed for the same beneficial owner in the same product and expiration month, and, for a put or call option, the same strike price, must be entered in good faith for the purpose of executing bona fide transactions that result in a change of ownership. Additionally, no person shall accept, execute or accommodate the execution of orders which are prohibited by this rule with knowledge of their character.

(CBOT Rule 534) (emphasis added.) CBOT's view that EFFs are wash sales under its rules is consistent with its position on wash sales involving other EFRPs and block trades. Specifically, as CBOT explained in its February 8 submission, it would take regulatory action against any matched, prearranged transactions intended to negate market risk whether made in the form of block, EFP or EFR. CBOT's position on wash sales has been acknowledged by the Commission through the self-certification process and has been known publicly for at least the past five years. Specifically, several CBOT advisories included the following language:

> Two parties may not execute contingent EFP, EFS or EFR transactions in which the execution of one such trade is contingent upon either the execution of another

> EFP/EFS/EFR or another offsetting cash, swap, or OTC transaction. In cases where two parties execute an EFP, EFS or EFR and execute an economically offsetting cash, swap or OTC transaction, the participants may be required to demonstrate that there was no express or implied obligation or understanding to execute both transactions. For example, two parties are prohibited from executing contingent March and June Treasury Bond EFPs to roll a position. *Similarly, two parties are prohibited from executing a CBOT EFP and a contingent EFP on another market in which the cash transaction economically offsets the cash leg of the CBOT EFP.* Such transactions are considered prearranged futures trades that circumvent the open market execution requirement. (emphasis added.)

Thus, without regard to the Commission's position on wash sales under CEA Section 4c, CBOT is obligated by the CEA to enforce its own rules and is not bound by the Commission's new, more liberal, position on wash sales under CEA Section 4c as articulated for the first time in its August 13 Letter to CBOT.

The third purpose of the CEA that CBOT Rule 538 is appropriate to achieve is the Act's mandate that boards of trade provide a competitive, open, and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the board of trade. 7 U.S.C. § 5(d)(9). As an initial matter, the CEA does not recognize an EFF as a permissible non-competitive transaction. The plain language of Designation Criterion 3 (Fair and Equitable Trading) and newly adopted Core Principle 9 (Execution of Transactions) specifically authorizes contract markets to permit, at their discretion, transfer trades or office trades, EFSs and EFPs. However, nowhere in Designation Criterion 3 or Core Principle 9 is there mention of EFFs.

Contrary to the Commission's assertion that Designation Criterion 3 or Core Principle 9 contains a "non-exclusive list of potentially permissible off-exchange transactions," (Commission Letter at 4, n.8,) the list, indeed, is exclusive. Under the principle of *expressio uniun est exclusio alterius*, the fact that a statute includes an item leads to the inference that the statute is not intended to cover an excluded item in groupings "when the items expressed are members of an 'associated group or series, justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003); *see also United States v. Vonn*, 535 U.S. 55, 65 (2002). Put differently, when a series includes two or more terms or things that should be understood to go hand in hand, the sensible inference is that the term left out must have been excluded. *Chevron U.S.A. v. Echazabal, 536 U.S. 73,* 81 (2002). In newly adopted Core Principle 9, we have a list of "exchange of futures" transactions and EFFs are not included. The inference that the omission of such transactions from the list was intentional is bolstered by the fact that this very provision was amended less than two months ago with the passage of the Dodd-Frank Act – in the midst of this very public debate about the permissibility of EFFs – and Congress chose not to add EFFs to the list, as it had previously added EFSs.[8]

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[8] Although the CFTC exceeded its authority under the CEA in approving ELX's EFF rule through the general rulemaking process, it had authority to exempt particular noncompetitive transactions pursuant to Section 4(c). An exemption is subject to the specific preconditions set forth in Section 4(c) of the CEA. *See* 7 U.S.C. §6(c). In relevant part, Section 4(c), 7 U.S.C. § 6(c), provides:

Not only does the Commission's decision conflict with long-standing cannons of statutory interpretations, the Commission's decision in this regard departs from its prior interpretation of the same statutory language without providing justification for its departure. The Commission discussed the meaning of the language contained in Core Principle 9[9] in a 1987 Report on Exchange of Futures for Physicals (the "EFP Report") and its conclusions in this regard are consistent with CBOT's reading of the statute as articulated above. Specifically, the Commission concluded that the EFP exception to the wash trade rule required an "exchange of futures (not forward contracts, options or cash contracts) for cash commodities or in connection with a cash (not a futures or option) transaction" and explicitly stated that a futures contract is not acceptable as the cash component of an EFP. (*See* EFP Report at 140, 160-61.) The Commission also explained that contract markets' authority under the CEA to permit by rule (subject to review and approval by the CFTC) transactions that might otherwise violate the CEA's prohibitions

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(c) Public interest exemptions

(2) The Commission shall not grant any exemption under paragraph (1) from any of the requirements of subsection (a) of this section unless the Commission determines that—

(A) the requirement should not be applied to the agreement, contract, or transaction for which the exemption is sought and that the exemption would be consistent with the public interest and the purposes of this chapter; and

(B) the agreement, contract, or transaction—

(i) will be entered into solely between appropriate persons; and

(ii) will not have a material adverse effect on the ability of the Commission or any contract market or derivatives transaction execution facility to discharge its regulatory or self-regulatory duties under this chapter.

Despite the Commission's exemptive authority, no exemption was sought by ELX and the Commission did not purport to exercise such authority sua sponte. First, the record is devoid of any information respecting the basis for the Commission's decision, if there was one, to allow the rule to become effective. Second, the Commission did not follow the procedural process necessary for granting an exemption to permit EFF transactions. Finally, no other exchange has petitioned the Commission for an exemption that would be necessary to complete an EFF transaction.

Even if ELX had sought an exemption from the CEA's general prohibition against noncompetitive transactions, we do not believe such an exemption would have been available because the conditions for an exemption were not met. ELX's EFF rule does not limit participants in EFFs on that exchange to "appropriate persons" as defined by the CEA. Moreover, to the extent that the EFF transaction was likely to result in the internalization of customer order flow, EFF transactions would have a material adverse effect on the ability of other contract markets to discharge their self-regulatory duties, including, but not limited to, compliance with Core Principle 9 as discussed herein.

9 The provision at issue in the EFP Report was former Section 4c(a), which stated in relevant part:

> Nothing in this Section shall be construed to prevent the exchange of futures in connection with cash commodity transactions or of futures for cash commodities, or of transfer trades or office trades if made in accordance with board of trade rules applying to such transactions and such rules shall have been approved by the Commission.

This language was deleted from former Section 4c(a) in 2000 with the enactment of the CFMA and, in substance, included in Section 5(d)(3) and was moved to Core Principle 9 (Section 5(d)(9)) with the passage of the Dodd-Frank Act.

against wash and fictitious trades and non-competitive trades was limited to those transactions explicitly authorized by the CEA. (EFP Report at 146, "[e]xchange rules cannot, of course, confer an exception to competitive trading which is broader than that provided for by Section 4c(a).")

In the EFP Report, the Commission also concluded that former Section 4c(a) excepted EFPs from the prohibited transactions listed in that provisions, including wash and fictitious trades, if the EFP complied with former Section 4c(a) "which, by its terms, includes compliance with all applicable exchange rules approved by the Commission." (EFP Report at 139-143 (emphasis added).) Moreover, in the EFP Report, the Commission repeatedly emphasizes the fact that, in order to be a legitimate trade, the EFP must, among other things, comply with ***all*** rules of the relevant exchange. In fact, on the first page of the EFP Report, the Commission states: "Notably, the Act authorizes EFPs only to the extent that they are conducted in accordance with the rules of a contract market." (EFP Report at 1.)

The Staff's question 1 implies that contract markets are obligated by the CEA to justify any prohibition against non-competitive trading. On the contrary, the fundamental principle underlying the CEA is that trading be competitive; contract markets are therefore obligated to prohibit non-competitive trades and not only must justify the necessity for any rule that allows for non-competitive trades, but also must establish that the rule will not harm the centralized market. CBOT again emphasizes the Commission's position on non-competitive transactions as articulated in the fall of 2008 when the Commission sought comment on its proposed guidance for Core Principle 9 and on certain proposed amendments to Regulation 1.38. In that Federal Register release, the Commission opined that the "implicit assumption" in Regulation 1.38 was that "trading should take place on the centralized market unless there is a ***compelling reason*** to allow certain transactions to take place off the centralized market." (emphasis added.) The Commission further noted that exchange rules and policies allowing such transactions:

> [S]hould ensure that the impact on the centralized market is kept to a minimum. For example, certain types of off-centralized market transactions, such as block trades and exchanges of futures for related positions, can create new positions or reduce prior positions. If these transactions become the exclusive or predominant method of establishing or offsetting positions in a particular market, it might jeopardize the centralized market's role in price discovery and would not comply with Core Principle 9, which provides that trading be competitive, open and efficient. (Id.)

As explained in its November 16 and February 8 submissions and now in this submission, CBOT has concluded that there is no reason – let alone a "compelling reason" – to permit EFF transactions in its markets. On the contrary, CBOT determined, long before the ELX adopted and submitted its EFF rule, that liquidity and transparency are best preserved if EFFs are not permitted, and CBOT has never permitted a futures contract to serve as the related position component of an EFRP.

For the better part of two years Congress has wrangled with financial regulatory reform and the resulting legislation, the Dodd-Frank Act specifically included the futures industry and resulted in numerous changes to the CEA. While Congress had every opportunity to endorse EFFs in the legislation, it instead refused to expand permissible noncompetitive trades beyond those already listed in the CEA and certainly did not mandate that DCMs be compelled to authorize such trades. Instead, the legislation amended Core Principle 9 of the CEA, adding new language that expressly states "[t]he board of trade shall provide a competitive, open, and efficient market and mechanism for executing trans actions *that protects the price discovery process of trading in the centralized market of the board of* *trade*." (7 U.S.C. § 5(d)(9).) As the U.S. House of Representatives and Senate stated, the legislation "[p]rovides tough new rules for transparency... to protect investors and businesses."[10] Congress, in debating financial regulatory reform, considered what law would ultimately be in the public's best interest and settled upon language that promotes competitive trading and protects the price discovery process. Congress clearly did not support non-competitive, non-transparent EFFs.

B. CBOT Rule 538 Is Not An Unreasonable Restraint of Trade

If CBOT Rule 538 were neither a necessary nor appropriate means for carrying out the foregoing purposes of the CEA (which it is), CBOT Rule 538 still complies with Core Principle 19 because it does not constitute an unreasonable restraint of trade. Without an "unreasonable restraint of trade," there can be no violation of Core Principle 19. Although there is no Commission precedent explicitly interpreting Core Principle 19, it cannot seriously be disputed that Core Principle 19's terms (the phrase "unreasonable restraint of trade" in particular) are derived from antitrust law. *See* 1 PHILIP MCBRIDE JOHNSON & THOMAS LEE HAZEN, DERIVATIVES REGULATION § 2.12[1] (Aspen Publishers 2004) (discussing legislative history of CEA Section 15, the predecessor to Core Principle 19). Indeed, as one leading scholar explained, with the amendment of the CEA by the CFMA in 2000:

> [S]ection 15 was reduced to a duty of the Commission to consider the antitrust laws and to endeavor to take the least anticompetitive means in adopting its own rules, regulations and orders. The obligation of the exchanges to do so in relation to its own rules and regulations was uncoupled and now appears as a "core principle" in sections 5 and 5a of the Act.

Id. at 613. This "core principle" was unchanged by the Dodd-Frank Act.

Although the phrase "unreasonable restraint of trade" does not appear in the text of the Sherman Act, it is a term of art that was established by early Supreme Court cases interpreting that statute's text. In *Standard Oil Co. of N.J. v. United States*, the Supreme Court ruled that the Sherman Act's broad prohibition of "restraint[s] of trade" in 15 U.S.C. §1 was limited by an implicit "rule of reason." 221 U.S. 1, 66 (1911) ("[T]he construction which we have deduced from the history of the act and the analysis of its text is simply that in every case where it is claimed that an act or acts are in violation of the statute, the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied."). The phrase "unreasonable restraint" was first used by the Supreme Court in the antitrust context only a year later in *United States v. Terminal R.R. Assoc. of St. Louis*, 224 U.S. 383, 394-95 (1912). It has since become a core term of antitrust analysis. *See, e.g., Oksanen v. Page Mem'l Hosp.*, 945 F. 2d 696, 702 (4th Cir. 1991) ("To prove a violation of section one of the Sherman Act . . . a plaintiff must show the existence of an agreement . . . that imposes an unreasonable restraint of trade."); *Telerate Sys., Inc. v. Caro*, 689 F. Supp. 221, 235 (S.D.N.Y. 1988) ("[N]ot every refusal separately to sell two products is a restraint of trade. Only those refusals to sell products separately that impose an unreasonable restraint of trade."). "[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well." *United States v. Hayes*, 129 S. Ct. 1079, 1086 (2009) (*quoting Bragdon v. Abbott*, 524 U.S. 624, 645 (1998)); *see also Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85-86 (2006) ("Congress can hardly have been unaware of the broad

10 Summary of Dodd-Frank Wall Street Reform and Consumer Protection Act, available at: http://financialservices.house.gov/Key_Issues/Financial_Regulatory_Reform/comprehensive_summary.pdf

construction adopted by both this Court and the SEC when it imported the key phrase – in connection with the purchase or sale" - into SLUSA's core provision. And when, judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.") (citations omitted).

Although ELX had originally invoked an antitrust case to support its claim, it now asserts that a violation of Core Principle 19 can be found where there is no "unreasonable restraint of trade" (Jan. 27, Letter); but ELX does not – because it cannot – provide any authority to support its conclusory assertion that something other than antitrust principles define "unreasonable restraint of trade." There is no authority to support ELX's contention that CEA Section 3(b) can be used by the CFTC to force CBOT to amend its non-competitive trading rules to conform to those of ELX in the absence of a finding that CBOT Rule 538 violates Core Principle 19. (Id. at 8.)[11]

Moreover, in its January 4 Letter to the Commission, ELX asserts that "[b]y blocking the implementation of the EFF Rule through the Advisory [Notice] the CBOT . . . [has] used [its] market dominance for anticompetitive purposes to deny market participants the advantages of this important tool, in violation of the CEA." (Jan. 4 Letter at 8.) This statement is not based in fact. Indeed, nothing in CBOT's Advisory Notice precludes any person from trading Treasury contracts at ELX or clearing those trades at the OCC. As discussed in CBOT's November 16 submission, no CBOT rule prevents CBOT customers from closing open positions at CBOT in accordance with CBOT's rules and reestablishing them at ELX:

> Any trader with a position at CBOT in a Treasury contract can quickly and easily exit that position and reestablish it at ELX by simultaneously buying and selling at the respective exchanges on their electronic systems. Indeed, our records indicate that CBOT has, at all relevant times respecting such transactions, had narrow spreads and substantial size bid and offered at the inside market. It is our understanding that ELX offers similarly narrow spreads and reported record volume in October 2009. If the size of the position to be moved is "too big" for the competitive market, a customer may enter into a block trade to liquidate its CBOT position and enter into a *separate and independent* block trade to establish an ELX position. In fact, ELX's block trading thresholds during regular trading hours are at least 80% smaller than the CBOT's block trading thresholds.

(Nov. 16 submission at 6-7.) Moreover, as evidenced by its express request in its Rule Filing for the Commission to order CBOT to amend Rule 538, ELX knew that EFFs were not permitted on CBOT prior to submitting the Rule Filing and subsequently purporting to interpret the rule for the market. The Advisory Notice did not alter the scope of permissible trades under CBOT Rule 538 or otherwise block the "implementation" of the EFF Rule.

Stripped of its conclusory assertion that the Advisory Notice "unreasonably restrains" trade, it is evident that ELX's real complaint is that the mechanisms available under CBOT's rule for transferring positions from CBOT to ELX – which are the same mechanisms that were available before the issuance of the Advisory Notice – are less than ideal for ELX's business model. While there is no Commission

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[11] Moreover, contrary to ELX's assertion, Section 6b of the CEA does not apply in this instance. The Commission has issued no order finding that CBOT Rule 538 violates Core Principle 19 or that Regulation 1.38 requires that contract market A must adopt the non-competitive trading rules of contract market B. Such an order would conflict with the plain language of the CEA and the Commission's regulations.

precedent explicitly interpreting Core Principle 19, as noted above, it is well-established antitrust law that mere disadvantage to a competitor is not an "unreasonable restraint of trade." As discussed in CBOT's November 16 and February 8 submissions, Supreme Court precedent emphasizes that, except in limited circumstances not applicable here, there is no duty for an enterprise to assist its rivals. *See Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP,* 540 U.S. 398, 411 (2004).

The legal principle enunciated in *Trinko* has been reaffirmed by the Supreme Court and the Court of Appeals for the Tenth Circuit in recent months. Specifically, on February 25, 2009, the Supreme Court, in *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, unanimously reversed the Ninth Circuit and held that a price-squeeze claim may not be brought under Section 2 of the Sherman Act when the defendant has no antitrust duty to deal with its rivals. The decision expands the scope of the Supreme Court's decision in *Trinko* and further limits a dominant firm's obligations to its rivals. *Linkline* not only refused to find the defendant at fault for having engaged in price-squeezing, but also stated that a defendant would be acting within its rights if it chose to exploit its dominant position in the digital subscriber line (DSL) services market by charging more for wholesale use of its essential DSL facilities than it did for retail use. *Id.* at 1122. On September 29, 2009, the Tenth Circuit in *Four Corners Nephrology Associates, PC v. Mercy Med. Ctr. of Durango*, held that a hospital's refusal to allow a physician access to its nephrology facilities does not constitute anticompetitive conduct under Section 2 of the Sherman Act. 582 F.3d 1216 (10th Cir. 2009). The Court, citing *Trinko* and *Linkline*, affirmed that the general rule is that a business – even a putative monopolist – has no antitrust duty to deal with its rivals. *See id.* at 1221.

In its January 4 Letter, ELX attempts to undermine *Trinko* as controlling precedent by relying on *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* which is cited in *Trinko*, to support its contention that CBOT acted in an anticompetitive manner in violation of Core Principle 19 by issuing the Advisory Notice. Contrary to ELX's representations, *Aspen* is inapposite and does not support its claim. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585 (1982). In *Aspen*, the competitors had a long-standing and profitable business relationship. The entities previously offered skiers an "all-Aspen" ski pass that could be redeemed at either entity's ski resort(s). Aspen Skiing owned three ski resorts, while Aspen Highlands owned only one. Aspen Skiing terminated its participation in the "all-Aspen ski pass" in favor of a ski pass that allowed skiers access to only its resorts. Although Aspen Highlands was willing to pay full retail price for lift access so that it could offer skiers a pass to more than one resort, Aspen Skiing refused to accept even full retail price. The Supreme Court cited both the pre-existing business relationship between the competitors and the lack of a reasonable economic justification for declining full retail price for ski access in finding that the jury that decided the case could reasonably have inferred that Aspen Skiing's exclusionary conduct was anticompetitive.

Here, unlike Aspen Skiing, CBOT has had no pre-existing business relationship with ELX. Moreover, the Advisory Notice did not reflect a change in policy at CBOT – it was issued solely in response to ELX's publicly purporting to interpret CBOT Rule 538. Had ELX not issued public misstatements purporting to interpret CBOT's rule, CBOT would not have had any reason to clarify CBOT Rule 538 for its members because the CBOT rule was clear on its face and CBOT had never permitted EFF transactions.

Furthermore, unlike Aspen Skiing, CBOT has reasonable economic (and business) justifications for CBOT Rule 538. As previously discussed, CBOT has concluded that the transactions contemplated by the ELX EFF Rule, if effectuated, would adversely impact transparency and liquidity in CBOT's Treasury futures market. As the Commission is aware, the success of a contract market in the futures industry depends on the liquidity and transparency of its market. As previously noted, liquidity is the result of investment by exchanges in developing products, trading and clearing infrastructures, and a regulatory regime that attract market participants. Market participants who choose to transact on CBOT obtain the benefit of CBOT's liquidity, trading technology, clearing services and regulatory integrity, and the broader market benefits from the efficient price discovery that CBOT's liquidity yields. CBOT market participants rely on this framework of liquidity, transparency and integrity, and it is their confidence in that framework that sustains CBOT's business. CBOT is not obligated to facilitate free riding by competing exchanges and the undermining of its ability to establish effectual rules to promote market integrity by adopting a rule to permit EFFs. Thus, the issuance of the Advisory Notice certainly was justified in response to ELX's public misstatements regarding the meaning of CBOT Rule 538.

Contrary to ELX's suggestion, an exchange's refusal to adopt new rules or amend established rules in order to assist a competitor is not the kind of behavior contemplated by Core Principle 19; it also is contrary to the specific findings of the Supreme Court in *Trinko* as strongly re-affirmed in *Linkline* and its progeny. Thus, CBOT is not unreasonably restraining trade in violation of Core Principle 19 by refusing to structure its rules in the way that will best facilitate the transfer of its open book of business to OCC in order to assist ELX in its efforts to acquire a greater market share of Treasury futures contracts. Because the Advisory Notice fully and clearly complies with Core Principle 19 – the only provision of the CEA CBOT is alleged by ELX to have violated – the Commission may not take action against CBOT pursuant to either Sections 8a(7) or 6b of the CEA as ELX argues. (Jan. 4 Letter at 9.)

C. EFFs Will Discourage Innovation In the Futures Industry

A fundamental purpose of an EFF rule is to permit exchanges to free ride on another exchange's established liquidity pool - a liquidity pool established through innovation in product design, investments in education and marketing to liquidity providers and end-users, investments in trading and clearing infrastructure, services and facilities, and establishment of a regulatory regime that promotes confidence among market participants. In the present situation, for example, ELX is attempting to use EFFs to leverage CBOT's liquidity rather than offer a new value proposition that would attract liquidity providers and end-users to its markets. Achieving first mover advantage and growing and retaining an established liquidity pool in the futures industry is what drives fervent investment and innovation. As one court explained, "[p]ut another way, it is the investor's potential pay-off that breeds risk-taking investment. To deny the payoff is to deter the investment."[12]

Moreover, a comparison of the fundamentals of the futures and equity securities industries make obvious the unique importance of innovation to futures. The vast majority of equities and equity options have an established, tangible underlying asset that gives the financial instrument value. An initial public offering or an option on an established equity is hardly innovation. While there are certain facets of the industry that do involve legitimate innovation, certain elements of the law, such as intellectual property, protect the incentive to innovate. For example, index-based ETFs may be licensed to certain exchanges. Unlike the equity and equity options industries, the futures industry ordinarily relies upon exchanges to offer new products to traders, products which are generally not protected by intellectual property.

Because new products in the futures industry are generally not protected by intellectual property, first-mover advantage drives innovation in futures products. An exchange that invests and innovates in new products may be rewarded with an established liquidity pool. Such a liquidity pool benefits market

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12 *Four Corners Nephrology Assoc. v. Mercy Med. Ctr. of Durango*, 582 F.3d 1216, 1222 (10th Cir. 2009).

participants and the exchange. Competition for new products would be adversely affected if rivals were permitted to free ride on an exchange's innovation and investments by virtue of compelled acceptance of EFFs. Indeed, one need only look to ELX - an exchange that has offered no unique products or any new value proposition to the market - to see that EFFs are an effort to free ride on the investments and innovations of others and to appreciate how compelling exchanges to adopt EFFs can undermine market incentives to innovate and invest.

For further discussion of the legal basis upon which CBOT prohibits EFFs, please see CBOT's response to question 3 below, as well as CBOT's November 16 and February 8 submissions.

2. **Please identify each legal, economic and business rationale for permitting EFPs, EFRs and EOOs. Please include a detailed description of the mechanics involved in the various forms of EFRPs permitted under CBOT Rule 538 and how they may be materially distinguishable from those associated with EFFs.**

EFFs, like legitimate EFRPs, are transactions which are bilaterally negotiated and executed outside of the central market, and ELX contemplates that EFFs will be executed and cleared in the same manner as legitimate EFRPs. Consequently, there is no material distinction in the manner by which such trades are mechanically executed and cleared. However, as described in our prior submissions, EFF transactions are very dissimilar in both construct and function from legitimate EFRPs. In terms of construct and function, EFPs, EFRs and EOOs involve the simultaneous execution of two fundamentally different instruments (a cash or OTC instrument and a futures or futures option instrument) that involve basis risk and are designed to accomplish a hedging objective. The EFFs contemplated by ELX, on the other hand, involve fundamentally identical futures contracts with identical underlying contract specifications – that is, there is no basis risk or hedging objective. ELX's EFFs are designed to move open interest in an identical product from one clearing house to another. By ELX's own admission, EFFs are intended to accomplish an administrative goal, which is an implicit acknowledgment that the transactions have no economic substance and are constructed solely to move positions in a manner that negates market risk.

Moreover, open and competitive markets are the key to price discovery, which Congress has recognized as a significant public benefit performed by futures markets and which, as the recent regulatory reform legislation indicates, many would like to see extended to certain OTC markets. The CFTC has maintained that off-exchange trading must not operate in a manner that compromises the integrity of prices or price discovery on the centralized market. Therefore, contract markets seeking to sponsor non-competitive trades bear the burden of showing that there is a "compelling reason" for permitting the requested trades, that the trades will not compromise the centralized market's role in price discovery and that the trades' impact on the centralized market will be kept to a minimum.

In this case, there is no reason that the management of positions and margin requirements necessitates the use of transactions that involve no market exposure, market risk or economic substance and that compromise market transparency and competition. Given that the underlying product is the same, that the prices on each exchange closely track each other and that both exchanges facilitate competitive trading on their respective open electronic platforms, participants can easily use automated spread engines to minimize execution risk if they desire to unwind a position at one exchange and establish it at another.

Additionally, traditional EFRPs must be executed pursuant to the CBOT's rules and do not provide a mechanism to circumvent those rules. By contrast, allowing for EFFs completely undermines the CBOT's ability to establish rules that it believes are in the best interests of preserving liquidity, transparency and competition in its markets and effectively allows participants to circumvent CBOT rules by executing trades pursuant to ELX rules and then transferring those positions to CBOT via an EFF.

For example, the minimum quantity threshold for block trades in Ten-Year Note futures on ELX is 1,000 and the reporting requirement is 15 minutes. The minimum quantity threshold for block trades in Ten-Year Notes on CBOT is 5,000 and the reporting requirement is 5 minutes. CBOT established its minimum quantity thresholds to minimize the degree to which block trades siphon transactions from the central market that would otherwise contribute to liquidity, transparency, competition and effective price discovery. CBOT established its 5 minute reporting period to minimize the impact to transparency in the reporting of large transactions.

If CBOT were required to permit EFFs, CBOT's rules would have no practical effect. Parties could simply circumvent these rules by executing a 1,000-lot block in the ELX Ten-Year Note contract, report it 15 minutes later to ELX, and simply transfer the position to CBOT via an EFF, thereby undermining the CBOT's rules that are designed to preserve market integrity and compromising the liquidity and transparency that are critical to the success of the CBOT market.

ELX's lower block thresholds also facilitate the internalization of smaller orders, which harms the broader market by removing liquidity from the market, reducing competition and compromising price discovery, and which may also harm individual customers by failing to present the customers' orders to the competitive market or allowing the broader market to benefit from the execution of those orders.

Further, there can be longer term consequences to liquidity arising from ELX's effort to avoid the CBOT's rules. Assume the market is 20 bid and offered at 20.5 on CBOT. A 1,000-lot block is executed on ELX at 18. Parties who are bidding 19 and 20 on CBOT are hit by the buyer of the ELX block which has yet to be reported and the parties to the block subsequently transfer their block to the CBOT via an EFF. The market makers who are consistently being picked off by those internalizing order flow will respond by either declining to make markets or widening their spreads, both of which are substantially detrimental to the market liquidity which is the lifeblood of a futures contract.

Finally, market participants routinely rely on open interest as a measure of liquidity, and open interest affects both market participants' willingness to establish a position on a particular market and the quality of the markets that market makers post. If large quantities of open interest evaporate from the CBOT without exposure to the market because the position has been moved via an EFF to ELX, (where again, the parties can then unwind their positions away from the central market by virtue of ELX's liberal block rules), this too will have deleterious consequences to liquidity and create greater price volatility.

3. **In its February 8, 2010 letter to Commission staff, CBOT stated:**

   A. **[A]lthough we respond to ELX's allegations in more detail below in our response to the specific questions posed by the Commission, we note that ELX can compete effectively without a CFTC order forcing CBOT and CME Clearing to close out positions without any legitimate trade. ELX has established open interest, a relatively tight bid/offer spread and depth at the inside market. Any**

person or entity holding CBOT positions can liquidate its CBOT positions and establish ELX positions using the respective electronic systems of each market. In addition, since most of the open interest is in the front month, it rolls each quarter, and parties are free to roll their positions from CBOT to ELX by means of legitimate transactions.

B. **CBOT is not unreasonably restraining trade in violation of Core Principle 19 by refusing to structure its rules in the way that will best facilitate the transfer of its open book of business to OCC in order to assist ELX in its efforts to acquire a greater market share of Treasury futures contracts.**

Please identify each basis for the foregoing contentions. Please provide empirical evidence supporting the various assertions made in this statement.

A. Response

The basis for the statement in A above was contained in CBOT"s February 8 submission. Specifically, in its February 8 submission, CBOT explained that:

> The Treasury complex at both CBOT and ELX are liquid markets and there is no legitimate reason to permit a non-competitive transaction without any economic substance that will cause sudden, inexplicable changes in open interest. Any trader with a position at CBOT in a Treasury contract can quickly and easily exit that position and reestablish it at ELX by simultaneously buying and selling at the respective exchanges on their electronic systems. Our records indicate that CBOT has, at all relevant times related to such transactions, had narrow spreads and substantial size bid and offered at the inside market. It is our understanding that ELX offers similar narrow spreads and ELX reported record volume in October 2009. Thus, CBOT does not believe it is in the interest of the market or of its customers to offer holders of open interest the opportunity to eliminate their positions and open interest without any legitimate trade.

The records we referenced in the foregoing response combined our review of publicly available information, including reported volume, open interest and bid/ask spreads published by ELX. (*See* Market Data Reports, ELX Futures, available at http://www.elxfutures.com/getdoc/01690dae-0513-41d4-bfcd-46e7825ad119/Market-Data-Reports.aspx) (last visited Sept. 9, 2010)). We also relied on public statements by ELX's CEO, Neal Wolkoff, who reported to the market on many occasions prior to CBOT's February 8 submission the success that ELX was experiencing in its Treasury futures complex: "We are pleased to report record trading volumes today in our Treasury products. This is a remarkable accomplishment and shows the great strides that we have made since our launch. We expect to continue to build on our volume figures to achieve new records in the months ahead."[13] In fact, as recently as May 3, 2010, ELX issued a press release announcing record average daily volume and record average daily open interest. (Press Release, ELX Futures, ELX Futures Sets Record Average Daily Volume in April (May 3, 2010), *available at* http://www.elxfutures.com/News-Events/ELX-Futures-Sets-Record-Average-Daily-Volume-inAp.aspx.) Mr. Wolkoff also regularly reported record volume, open interest and

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[13] Press Release, ELX Futures, ELX Futures Reports Record Total Volume Trading Day (Feb. 8, 2010), *available at* http://www.elxfutures.org/News-Events/ELX-FUTURES-REPORTS-RECORD-TOTAL-VOLUME-TRADING-DA.aspx

increasing market share for Treasury futures contracts on his Twitter page, available at http://twitter.com/nealwolkoff (posted statements include "ELX Market share is above 11% in the 2 year note;" "ELX record open interest;" "Rising ELX volume again: over 51,000 contracts, record ELX volume in the 30 year, over 5% share in the 5 year and over 3% share overall.")

B. Response

For a discussion of why CBOT is not unreasonably restraining trade in violation of Core Principle 19 by choosing not to structure its rules in the way that will best facilitate the transfer of its open book of business to OCC in order to assist ELX in its efforts to acquire a greater market share of Treasury futures contracts, please see CBOT's response to question 1 above, as well as its November 16 and February 8 submissions.

To the extent this inquiry is predicated on the assumption that CBOT's actions are directed at its customers rather than ELX, the facts do not support such a position. CBOT continues to treat all of its customers the same today as it did in the months and years prior to the launch of ELX and consistently strives to improve services and enhance the trading experience and opportunities of all of its customers. Customers who wish to trade at ELX may do so at any time, regardless of whether or not they have open positions at CBOT.

The Supreme Court has previously found that an alleged monopolist's refusal to deal with customers in an effort to force a boycott of a rival may violate the antitrust laws.[14] In *Lorain Journal*, a monopolist newspaper publisher refused to accept advertisements from customers who advertised, or who the monopolist believed were about to advertise, with a new radio station. "Those using the station's facilities had their contracts with the publisher terminated and were able to renew them only after ceasing to advertise through WEOL."[15] The court concluded, "[t]he publisher's attempt to regain its monopoly of interstate commerce by forcing advertisers to boycott a competing radio station violated [Section] 2."[16]

In the present situation, however, CBOT is not organizing a boycott of ELX, denying its products or services or otherwise discriminating against any customers who choose to trade on ELX. ELX has volume and open interest on its markets, and CBOT would not be surprised if those traders previously held or currently hold positions on CBOT. Whereas the publisher in *Lorain Journal* threatened to cease dealing with its customers that considered advertising on the radio station, CBOT continues to serve all of its customers in the same manner it has for years regardless of where else they may trade.

CBOT's enforcement of its rules cannot be the foundation for an antitrust violation. In prohibiting non-competitive trades such as EFFs, CBOT seeks to protect the liquidity and integrity of its markets. Traders opening, closing or holding positions at CBOT understand they are subject to the rules of the CBOT and their confidence in the market is based, in part, on the knowledge that those rules are assertively and objectively enforced. In issuing its Advisory Notice on October 19, CBOT responsibly sought to correct gross misstatements made by ELX about CBOT's rules and inform its market participants of their continuing obligation to comply with Rule 538 and of CBOT's continuing commitment to enforce its rules. As a self-regulated organization under the CEA, CBOT, not ELX, is responsible for the protection of CBOT's markets and the interpretation and enforcement of its rules.

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14 *Lorain Journal Co. et al. v. United States*, 342 U.S. 143, 155 (1951).
15 *Id.* at 149.
16 *Id.* at 152.

4. **Please explain the basis for setting CBOT's minimum block trading sizes respecting Treasuries. For each of the last 12 months, please identify: (i) the percentage of CBOT contracts traded in block trades and permissible EFRPs; and (ii) the percentage in lots at or above ELX's minimum block trading size.**

CBOT initially introduced block trading in its Treasury complex in January 2008 and, other than to establish thresholds for the new Long Term Treasury Bond futures contract launched in January 2010, CBOT last adjusted its block thresholds in the Treasury complex in March 2009. Prior to January 2008, CBOT did not permit block trading in its Treasury complex, and, to be clear, consistent with the CEA and Core Principle 9, DCMs are no more obligated to offer block trading facilities than they are obligated to offer EFF facilities.

In establishing appropriate minimum block thresholds in March 2009, the primary objective was to balance the exchange's interest in continuing to promote competitive execution, price transparency and liquidity in the centralized market, with the desire to meet the needs of institutional traders who occasionally seek to execute unusually large transactions and wish to do so in an efficient manner that is not disruptive to the centralized market. The primary basis for determining appropriate futures block thresholds was an analysis of the average quantity available in the CME Globex order book in the lead month contract at the first five price levels on the bid and offer sides of the market and evaluating those results in the context of the stated objectives. The results produced significant differences in liquidity during Regular, European, and Asian hours, which led to the recommendation to establish separate thresholds for each of those time segments. In the interest of minimizing complexity for market participants, the thresholds established for European hours were 50% of the threshold during Regular Hours and the thresholds established for Asian hours were 50% of those established during European hours.

The table below provides a comparison of the hourly market depth averages to the block minimums for YTD 2010:

	Regular Hours (7am-4pm, CT)		European Hours (12am-7am, CT)		Asian Hours (4pm-12am, CT)	
Futures	Avg Book	Block Minimum	Avg Book	Block Minimum	Avg Book	Block Minimum
T-Bond	3,352	3,000	1,673	1,500	1,085	750
10-Yr Note	8,652	5,000	4,952	2,500	2,737	1,250
5-Yr Note	4,819	5,000	2,576	2,500	1,343	1,250
2-Yr Note	15,112	5,000	5,520	2,500	2,631	1,250

The following table identifies the percentage of the core CBOT Treasury futures contracts traded as EFRPs and block trades for each of the last twelve months

Percentage of Core Treasury Futures Volume Traded As EFRPs and Block Trades

Month	Two-Year Notes EFRP% / Block%	Five-Year Notes EFRP% / Block%	Ten-Year Notes EFRP% / Block%	30-Year T-Bonds EFRP% / Block%
Aug 2009	4.33% / 0.33%	2.36% / 0.47%	1.68% / 0.08%	3.30% / 0.19%
Sep 2009	3.90% / 0.79%	1.08% / 0.23%	1.12% / 0.05%	2.75% / 0.14%
Oct 2009	5.24% / 1.06%	2.30% / 0.94%	1.76% / 0.17%	2.66% / 0.34%
Nov 2009	3.21% / 0.51%	2.45% / 0.51%	1.56% / 0.06%	3.11% / 0.00%
Dec 2009	4.90% / 0.31%	2.91% / 0.09%	2.22% / 0.02%	6.64% / 0.28%
Jan 2010	5.86% / 1.22%	3.37% / 0.31%	2.56% / 0.11%	3.86% / 0.43%
Feb 2010	4.81% / 0.38%	2.86% / 0.13%	1.89% / 0.07%	1.65% / 0.21%
Mar 2010	7.34% / 0.48%	4.44% / 0.10%	3.88% / 0.36%	3.50% / 0.12%
Apr 2010	4.71% / 0.82%	2.83% / 0.14%	3.04% / 0.27%	2.64% / 0.14%
May 2010	4.61% / 1.25%	3.90% / 0.36%	2.97% / 0.23%	3.39% / 0.19%
Jun 2010	3.44% / 0.39%	4.86% / 0.06%	3.03% / 0.01%	2.53% / 0.11%
Jul 2010	3.56% / 1.77%	3.45% / 0.44%	2.28% / 0.23%	2.04% / 0.22%

The table below reflects the percentage of volume executed for filled orders in the core CBOT Treasury futures that were for quantities at or above ELX's minimum block trading size.[17] It should be recognized, however, that these percentages understate the true percentages because many large orders are executed algorithmically in smaller increments with each increment submitted to the matching engine as a unique order.

Percentage of Core Treasury Futures Volume Traded at or Above ELX Block Minimum

Month	Two-Year Notes (ELX Block =1,000)	Five-Year Notes (ELX Block =1,000)	Ten-Year Notes (ELX Block =1,000)	30-Year T-Bonds (ELX Block =500)
Aug 2009	27.43%	16.47%	15.39%	33.49%
Sep 2009	10.61%	2.11%	3.42%	8.75%
Oct 2009	12.78%	3.77%	6.67%	5.52%
Nov 2009	38.25%	21.23%	21.54%	36.63%
Dec 2009	10.95%	7.95%	9.61%	6.32%
Jan 2010	9.24%	4.00%	7.15%	4.75%
Feb 2010	36.40%	23.25%	23.45%	35.88%
Mar 2010	15.09%	7.43%	10.68%	12.33%
Apr 2010	14.26%	4.70%	11.19%	8.73%
May 2010	29.04%	14.51%	17.01%	20.84%
Jun 2010	9.27%	4.56%	7.75%	7.14%
Jul 2010	14.84%	4.96%	8.30%	6.58%

As reflected by these figures, the proportion of volume that is executed for large orders increases during the quarterly roll period as parties roll their open interest from one contract month to the next via spread transactions. Unlike ELX, CBOT does not permit calendar spreads to be executed as block trades or as EFRPs.

5. **Please identify an appropriate maximum percentage of block trades and permissible EFRPs that CBOT believes avoids material risk to the liquidity and price discovery functions of its centralized Treasuries market, and explain how that figure was reached.**

From January through July, 2010, permissible EFRPs and block trades have represented approximately 3% of Treasury futures volume. CBOT believes that its Treasury markets are functioning effectively and that the exchange has struck the appropriate balance between promoting and protecting competitive trading, price transparency and market liquidity, while accommodating a small percentage of specified types of non-competitive trades to satisfy certain legitimate business needs. If block trades or permissible EFRPs were to comprise a larger percentage of our overall volume in these markets than they do currently, liquidity and the price discovery function could be adversely impacted, but we clearly have no way of knowing the precise threshold at which such negative consequences would manifest themselves and we would have to evaluate the impact of any such growth in the context of the relevant market dynamics. Given that we believe our markets are functioning effectively under CBOT's current rules, and for the reasons we have articulated in this and our prior submissions, we do not believe that permitting EFFs would benefit our markets or market participants. We therefore see no legitimate

[17] For the purposes of this analysis, an order for 1,000 contracts that was executed opposite a 400-lot and two 300-lots is counted as an order eligible to be executed as a block on ELX despite the fact that the order was transacted on CBOT in three transactions of quantities below the ELX block threshold. In that example, volume is 1,000 and the percentage of volume involving an order of 1,000 or more contracts is 100%.

business, legal or economic reason to allow such trades and clearly have no obligation under the CEA to do so.

6. **Please identify each potential impact of EFF transactions on CBOT's centralized trading respecting Treasuries, including the impact on trading volume, liquidity and the price discovery function of such markets. In your answer, please address separately the potential impact of EFFs that result in a net move of a customer's open interest from CBOT to another DCM, of EFFs that result in a net move of a customer's open interest from another DCM to CBOT, and those that result in no net move of open interest.**

For a discussion of the full impact of EFF transactions on trading volume, liquidity and open interest at CBOT, please see CBOT's response to questions 1 and 2 above. As described in those responses, EFFs can result in positions being initiated or offset on CBOT, but in either case, we do not believe such transactions to be bona fide transactions and, in either case, there are potentially detrimental impacts to the liquidity, competitiveness, transparency and integrity of CBOT markets.

7. **Describe with specificity how permitting EFFs would undermine any of: (a) the purposes of the CEA or (b) CBOT's rules. With respect to CBOT's rules, please identify in your answer each specific rule affected and the date each such rule was adopted. Please also include a description of the purpose and function of each affected rule.**

For a discussion of how permitting EFFs would undermine the purposes of the CEA, please see CBOT's response to question 1 above as well as CBOT's November 16 and February 8 submissions.

In addition to undermining the purposes of the CEA, permitting EFFs would undermine the purposes of several specific CBOT rules, and more generally, its ability to operate its Treasury futures market in the manner that it believes is in the best interests of preserving liquidity, transparency and competition in its markets. As described in this letter, compelling CBOT to adopt EFFs effectively allows participants to circumvent those rules by executing trades pursuant to ELX rules and then moving those positions to CBOT via an EFF. In effect, forcing CBOT to permit EFFs would undermine its self-regulatory authority and obligations under the CEA.

The specific CBOT rules that would be undermined include: (1) block trading (Rule 526), (2) non-competitive/prearranged trades (Rule 539), (3) wash trades (Rule 534) and (4) EFRP Rule (Rule 538).

For a discussion of the purpose and function of these rules and how permitting EFFs would undermine these rules, please see CBOT's response to questions 1, 2 and 4 above, as well as CBOT's November 16 and February 8 submissions. Further details also are included in the most recent advisory notices respecting the relevant sections of these rules, which are attached hereto as Exhibit A.

8. **Describe each step that CME/CBOT would need to take in order to permit and implement EFF transactions, including the anticipated mechanics and reporting requirements to clearinghouses.**

As an initial matter, if CBOT were required to permit EFFs, CBOT believes that it would need additional information regarding the scope of the exact transaction(s) that it would be required to permit in order to detail precisely the steps it must take to "permit and implement EFF transactions." In the absence of such details from the Commission, at this time, CBOT believes that, at a minimum, it would need to:

- Make a determination as to the specific products that could be traded as part of an EFF. e.g. CBOT would be mandated to accept EFFs involving only identical CBOT and ELX products, or would it be mandated to allow EFFs between, for example, a 2-Year CBOT Treasury futures versus a CME or ELX Eurodollar strip, a CBOT 5-Year Treasury Note against an Interest Rate Swap Future, or 5-Year Treasury Note futures against the appropriate ratioed units of 10-Year Treasury Note futures. ELX's rule, as written, appears to allow for all of these types of transactions.
- Draft rules and associated Advisory Notices to allow EFFs as permissible non-competitive trades on CBOT;
- Amend CBOT's wash trading rule to provide that the EFFs mandated by the Commission are exempted from its coverage.
- Follow the CBOT rule approval process and submit appropriate filings to the CFTC for approval;
- Develop appropriate regulatory protocols for enforcing the EFF rule, determine the resources needed and develop the programs and systems necessary to support monitoring and enforcement of the rules.
- Modify its front-end clearing system to accommodate a new transaction type for EFF transactions.
- Modify Exchange volume reports to report EFF transaction volume

9. Please identify each distinction between ELX's EFF Rule and NYMEX's Basis Trade Facility.

As noted in CBOT's February 8 submission, NYMEX's Basis Trade Facility Rule (the "NYMEX rule") was materially different from ELX's EFF rule. The NYMEX rule was, in substance, a restricted block trading rule that included information-reporting requirements analogous to those contained in EFRP rules. In fact, at the time that the NYMEX rule was submitted to the Commission for approval, neither NYMEX nor International Petroleum Exchange ("IPE") had block trading rules governing Brent Crude Oil futures contracts.

Moreover, unlike ELX's EFF rule, the NYMEX rule explicitly provided that a market participant seeking to take advantage of the rule needed to liquidate its position on the other contract market pursuant to the rules of *that* contract market. Specifically, the NYMEX rule provided: "As a condition precedent to the NYMEX Transaction, the parties to the NYMEX Transaction *must have engaged in a transaction on the other regulated futures exchange pursuant to the procedures of such other exchange that resulted in liquidating an existing position at such other exchange*." (*See* NYMEX Rule, subsection (2) (emphasis added).) Thus, NYMEX never purported to bind another contract market nor asked the Commission to mandate that other exchanges be bound by its rule.

Other differences include:

- The NYMEX rule provided that the minimum transaction size for effectuating trades pursuant to the rule was 50 contracts, which, at the time, exceeded in size more than 90% of the transactions that had been executed in the months before NYMEX sought approval for the rule in the contract at issue;
- Only "eligible contract participants," as defined in the CEA, could take advantage of the new procedure set forth in the NYMEX rule;
- Under the NYMEX rule, the two transactions were independent of each other and did not necessarily involve the same parties;

- Under the NYMEX Rule, the contract specifications of the two instruments needed to be "substantially equivalent";
- The details of the transaction on NYMEX needed to be reported to a NYMEX clearing member within 2 hours of the transaction's completion;
- The NYMEX rule required a report of each EFF be given and notice thereof posted on the Floor of the exchange. The report needed to be given on the Floor of the Exchange during the hours of futures trading on the day that the transaction was made, or the next business day if made after the close of business; and
- The NYMEX rule required that the clearing member to report, among other things, that the EFF had resulted or would result in a change of positions and report such information by noon no later than two exchange business days after the day of posting the EFF on the Floor of the exchange.

None of these requirements is present in ELX's EFF Rule.[18] Moreover, as previously highlighted for the Commission, the NYMEX rule was: (i) approved only as part of a one-year pilot program and applied only to NYMEX's Brent Crude Oil Futures Contract; (ii) was never implemented (therefore no transaction was ever effectuated pursuant to the rule); and (iii) ***withdrawn from a proposed rule filing in 2004 pursuant to the Commission's request***.

10. Provide CBOT's projection of likely volume of EFFs if CBOT were required to permit them as another EFRP. If you expect the likely volume to be materially different from, or similar to, other EFRPs, explain in detail the basis for your expectation.

At this time, CBOT has not made any projection of the likely volume of EFFs if CBOT were required to permit them. Moreover, in order to make any projections respecting the likely volume of EFFs if CBOT were required to permit them, CBOT would need to know, among other things, what contracts could be traded as EFFs, the exchange(s) upon which the other leg of an EFF might be transacted, the volume and open interest at the other exchange(s), the nature of the customer base at the other exchange(s), the rules of the other exchange(s) respecting block trades, and any other restrictions that might be imposed on such transactions, e.g. any prohibitions on using EFFs to circumvent other CBOT rules, such as its rule on executing calendar spreads as blocks or its rules governing pre-execution communications.

As explained in our February 8 submission and herein, we are aware of no CBOT customer who has requested CBOT to authorize EFFs with ELX or any other exchange. Indeed, as CBOT previously reported to the Commission, we do not believe that any legitimate trading in Treasury futures is taking place on ELX. ELX's trading patterns and open interest movements suggest that a few traders are exchanging positions for the sole purpose of creating the appearance of active trading. It would be relatively easy to determine the extent to which trading on ELX involves participants other than the owners of the exchange, and if it is found that the trading that has been occurring for the past year is not legitimate, but rather designed to give the appearance of legitimate volume, then this activity should be addressed and the exchange should be sanctioned.

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[18] Notably, the IPE issued a market advisory notice similar to CBOT's Advisory Notice stating that IPE did not allow EFFs. Also, the ELX Rule permits a "participant" to facilitate, as principal, and EFF on behalf of a "customer," provided that the "participant" can demonstrate that the futures position was passed through to the "customer"; such a pass through was not permitted by the NYMEX rule.

Should the CBOT be compelled to accept EFFs, it is our belief that such trades would be used solely to free ride on CBOT's liquidity and open interest. ELX could also conceivably buy some portion of that open interest by paying market participants to move their positions to ELX via the EFF mechanism in order to create the appearance that ELX is a legitimate exchange at which real customers hedge risk and maintain open interest.

11. Please produce all documents (beginning July 2009) discussing potential customer demand for EFFs, including the results of any surveys, outreach or other information available to CBOT. Please include any information concerning the customer most likely to use EFFs.

We have conducted a search of the files of the CME Group/CBOT employees that interact with customers and have located one document responsive to this request; the responsive portion of that document is attached hereto as Exhibit B. CBOT notes that it has not conducted any surveys or outreach on this topic and reiterate that we are not aware of a single customer who has requested that CBOT to offer EFFs or otherwise amend its rules to permit such transactions.

12. Provide an itemized form of the fees(s) and other revenues that CME Group recognizes each time a permissible EFRP is transacted, including both the clearing and execution fees. If CME believes the fees or revenues from EFFs could differ materially from those for other EFRPs in the event it were required to accept them, please identify and explain the expected difference.

Please see Exhibit C attached hereto for an itemized form of the fees charged each time a permissible EFRP is transacted. Please note that CME Group does not recognize any fees or revenues from EFRPs transacted on its contract markets; rather, each individual contract market imposes the fees on the EFRPs transacted on its own market and recognizes any revenue accordingly.

At this time, CBOT does not know what it would charge for EFFs if it were mandated to amend its rules to permit such trades. However, if such a change to our rules were required and we were unable to rectify that decision, CBOT would consider and appropriately weigh the value to ELX of being permitted to free ride on CBOT's considerable investment, the value of ELX customers being able to access the open interest of CBOT's contracts without contributing to the price discovery process and the impact that such transactions would have on the quality and integrity of our market.

If you have any comments or questions, please feel free to contact me at (312) 930-3488 or Kathleen.Cronin@cmegroup.com.

Sincerely,

Kathleen M Cronin

Kathleen Cronin
Managing Director, General Counsel and
Corporate Secretary
The Board of Trade of the City of Chicago, Inc.

Enclosures

Exhibit A

CME Group

A CME/Chicago Board of Trade/NYMEX Company

C.F.T.C.
OFFICE OF THE SECRETARIAT

2009 MAY 6 AM 10 41

May 6, 2009

Mr. David Stawick
Office of the Secretariat
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

RE: CME/CBOT Rule 526. ("Block Trades")
CME/CBOT Submission No. 09-090

Dear Mr. Stawick:

Chicago Mercantile Exchange Inc. ("CME") and The Board of Trade of the City of Chicago, Inc. ("CBOT") hereby notify the Commodity Futures Trading Commission that they have approved amendments to CME/CBOT Rule 526.G. ("Block Trades") that requires block trades to be reported to the Clearing House in an approved reporting method. The text of the rule changes is attached with additions underscored and deletions overstruck.

CME and CBOT certify that these rule changes comply with the Commodity Exchange Act and regulations thereunder.

If you have any questions regarding this matter, please contact me at (312) 648-5422.

Sincerely,

/s/ Stephen M. Szarmack
Director and Associate General Counsel

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FOR CME AND CBOT RULEBOOKS

Rule 526. BLOCK TRADES

The Exchange shall designate the products in which block trades shall be permitted and determine the minimum quantity thresholds for such transactions, subject to the provisions in Article IV, Section D(2)(e) of the Exchange's Certificate of Incorporation that are applicable to rule changes. The following shall govern block trades:

A. A block trade must be for a quantity that is at or in excess of the applicable minimum threshold. Orders may not be aggregated in order to achieve the minimum transaction size, except by those entities described in Sections I. and J.

B. Each party to a block trade must be an Eligible Contract Participant as that term is defined in Section 1a(12) of the Commodity Exchange Act.

C. A member shall not execute any order by means of a block trade for a customer unless such customer has specified that the order be executed as a block trade.

D. The price at which a block trade is executed must be fair and reasonable in light of (i) the size of the block trade, (ii) the prices and sizes of other transactions in the same contract at the relevant time, (iii) the prices and sizes of transactions in other relevant markets, including without limitation the underlying cash market or related futures markets, at the relevant time, and (iv) the circumstances of the markets or the parties to the block trade.

E. Block trades shall not set off conditional orders (e.g., Stop Orders and MIT Orders) or otherwise affect orders in the regular market.

F. The seller must ensure that each block trade is reported to the Exchange within five minutes of the time of execution. The report must include the contract, contract month, price, quantity of the transaction, the respective clearing members, the time of execution, and, for options, strike price, put or call and expiration month. The Exchange shall promptly publish such information separately from the reports of transactions in the regular market.

G. ~~Clearing members must report b~~Block trades must be reported to the Clearing House in accordance with an approved reporting method. ~~the Clearing House Manual of Operations.~~

H. Clearing members and members involved in the execution of block trades must maintain a record of the transaction in accordance with Rule 536.

I. A commodity trading advisor ("CTA") registered or exempt from registration under the Act, including, without limitation, any investment advisor registered or exempt from registration under the Investment Advisors Act of 1940, shall be the applicable entity for purposes of Sections A., B., C., and D., provided such advisors have total assets under management exceeding $25 million and the block trade is suitable for the customers of such advisors.

J. A foreign Person performing a similar role or function to a CTA or investment advisor as described in Section I, and subject as such to foreign regulation, shall be the applicable entity for purposes of Sections A., B., C., and D., provided such Persons have total assets under management exceeding $25 million and the block trade is suitable for the customers of such Persons.

CME Group
A CME/Chicago Board of Trade/NYMEX Company

October 29, 2009

Mr. David Stawick
Office of the Secretariat
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, D.C. 20581

RE: Amendments to Rule 534 ("Wash Trades Prohibited")
CME Group Market Regulation Advisory Notice RA0913-5
CME/CBOT/NYMEX Submission No. 09-251

Dear Mr. Stawick:

Chicago Mercantile Exchange Inc. ("CME"), The Board of Trade of the City of Chicago, Inc. ("CBOT") and The New York Mercantile Exchange, Inc. ("NYMEX") (collectively, "the Exchanges") hereby notify the Commodity Futures Trading Commission ("Commission") of amendments to Rule 534 ("Wash Trades Prohibited"). The revised language of the rule and the associated Market Regulation Advisory Notice seek to provide clarity to the marketplace concerning the wash trade prohibition.

First, the revised rule eliminates the reference to the time at which buy and sell orders in the same product and expiration month (and, for a put or call option, in the same strike price) are placed and instead simply prohibits the placement or acceptance of orders where the person knows or reasonably should know that the purpose of the orders is to avoid taking a bona fide market position exposed to market risk. The revised language clarifies that if the placement of buy and sell orders are for a non-bona fide purpose, simply ensuring that there is some undefined delay between the placement of the orders into the marketplace does not eliminate wash trade concerns where the orders ultimately trade opposite one another.

Next, the revisions eliminate language referring to the "same beneficial owner" and clarify that buy and sell orders for different accounts with common beneficial ownership (including accounts that have less than 100% common ownership) entered with the intent to negate market risk or price competition will also be considered wash trades.

Lastly, the new rule language indicates that it is a violation of Rule 534 to knowingly execute or accommodate the execution of wash trades by direct or indirect means. The addition of the reference to "indirect means" in the rule is to clarify that the knowing accommodation of another person's execution of a wash trade is a violation of the rule.

In connection with the adoption of the amendments to Rule 534, the Market Regulation Department will issue CME Group Market Regulation Advisory Notice RA0913-5 which includes the clean text of the revised rule and an updated FAQ on the rule.

The rule changes will be made effective and the Market Regulation Advisory Notice will be released on Tuesday, November 3.

By letter dated October 20, 2009, ELX Futures ("ELX") submitted a request to the Commission to stay the effectiveness of CBOT's recently released Market Regulation Advisory Notice RA0907-1 concerning a clarification to the marketplace that CBOT rules do not permit the execution of Exchange of Futures for Futures transactions pursuant to CBOT Rule 538 ("Exchange for Related Positions"). That Notice also clarified that a prearranged matched pair of block trades executed for the purpose of moving a futures position from one clearing house to another were prohibited by CBOT rules. The Exchanges wish to note to the Commission that the amendments to Rule 534 contained in this submission are in no way connected to the issues raised by ELX concerning the CBOT Advisory Notice. The amendments to Rule 534 and the associated Advisory Notice are solely intended to provide clarity to the marketplace regarding the prohibition on wash trading.

No opposing views were expressed with respect to the amendments to Rule 534.

The amendments are set forth below, with additions underscored and deletions overstruck. A copy of the Advisory Notice begins on page 3.

534. Wash ~~Sales~~Trades Prohibited

No person shall place ~~for the same beneficial owner~~ or accept buy and sell orders ~~for~~in the same product and expiration month, and, for a put or call option, the same strike price, ~~at or about the same time~~where the person knows or reasonably should know that the purpose of the orders is ~~with the intent~~ to avoid taking a bona fide market position exposed to market risk (transactions commonly known or referred to as wash sales). Buy and sell orders for different accounts with common beneficial ownership that are entered with the intent to negate market risk or price competition shall also be deemed to violate the prohibition on wash trades. ~~placed for the same beneficial owner in the same product and expiration month, and, for a put or call option, the same strike price, must be entered in good faith for the purpose of executing bona fide transactions that result in a change of ownership.~~ Additionally, no person shall knowingly ~~accept,~~ execute or accommodate the execution of such orders by direct or indirect means. ~~which are prohibited by this rule with knowledge of their character.~~

The Exchanges certify that the amendments and the Advisory Notice comply with the Commodity Exchange Act and regulations thereunder.

If you have any questions regarding the above, please contact Robert Sniegowski, Associate Director, Market Regulation, at 312.341.5991 or me at 312.648.5422. Please reference CME/CBOT/NYMEX Submission No. 09-251 in any related correspondence.

Sincerely,

/s/ Stephen M. Szarmack
Director and Associate General Counsel

7870

MARKET REGULATION ADVISORY NOTICE

Exchange	CME, CBOT, NYMEX & COMEX
Subject	Wash Trades Prohibited
Rule References	Rule 534
Advisory Date	November 3, 2009
Advisory Number	CME Group RA0913-5

This Advisory Notice supersedes CME Group Market Regulation Advisory Notice RA0904-5 from August 4, 2009, and is being reissued based on today's adoption of revisions to CME, CBOT and NYMEX Rule 534 ("Wash Trades Prohibited"). The amended rule and the FAQ contained in this Advisory Notice have been revised to clarify the following:

- It is impermissible to place, accept or execute buy and sell orders for accounts with common beneficial ownership opposite each other, either directly or indirectly, if the person knows, or reasonably should know, that that the intent of the orders is to avoid taking a bona fide market position exposed to market risk. Additionally, the fact that there is a delay between the entry of the buy and sell orders does not eliminate regulatory exposure if the execution achieves a wash result.

- Buy and sell orders for different accounts with common beneficial ownership (which includes accounts with less than 100% common ownership) will be deemed to be wash trades if orders are entered with the intent to negate market risk or price competition.

- Knowingly accommodating the execution of wash trades is a violation of the rule.

The revised rule is presented in its entirety below.

Rule 534 ("Wash Trades Prohibited")

No person shall place or accept buy and sell orders in the same product and expiration month, and, for a put or call option, the same strike price, where the person knows or reasonably should know that the purpose of the orders is to avoid taking a bona fide market position exposed to market risk (transactions commonly known or referred to as wash trades or wash sales). Buy and sell orders for different accounts with common beneficial ownership that are entered with the intent to negate market risk or price competition shall also be deemed to violate the prohibition on wash trades. Additionally, no person shall knowingly execute or accommodate the execution of such orders by direct or indirect means.

Questions regarding this Advisory Notice may be directed to the following individuals in Market Regulation:

Greg Benbrook, Associate Director, 312.341.7619
Robert Sniegowski, Associate Director, 312.341.5991
Nancy Minett, Director, 212.299.2940
Russell Cloughen, Associate Director, 212.299.2880

For media inquiries concerning this Advisory Notice, please contact CME Group Corporate Communications at 312.930.3434 or news@cmegroup.com.

FAQ Related to Rule 534 ("Wash Trades Prohibited")

Q1- **May a firm employee or floor broker accept buy and sell orders for simultaneous execution in the same product and expiration month, or in the case of options, the same put or call option and strike price?**

A1- Rule 534 effectively requires that all orders be entered in good faith for the purpose of executing bona fide transactions. A firm employee or floor broker should not accept such orders if he knows, or reasonably should know, that the orders are for the same account owner and the purpose of the orders is to avoid taking a bona fide market position exposed to market risk. Similarly, a firm employee or floor broker should not accept buy and sell orders for different accounts with common beneficial ownership that are entered with the intent to negate market risk or price competition.

The CFTC has held that firms, firm employees and floor brokers may be found to have knowingly engaged in wash trades if they facilitate a wash result without having made sufficient inquiry as to the propriety of such orders prior to their execution. The failure of a firm employee or floor broker to undertake such inquiry may support an inference of knowing participation in wash trades.

Q2- **Does the prohibition in the rule apply in circumstances where the underlying beneficial ownership of the accounts is common but not identical?**

A2- Where the two accounts share common ownership, but less than 100% common ownership, the prohibitions in Rule 534 nonetheless apply if the intent of the orders is to negate market risk or price competition.

Q3- **What steps must a person take to fulfill his duty to inquire about the propriety of the orders described in questions 1 and 2 above?**

A3- The firm employee and floor broker, working together or independently of each other, should determine if the orders are for accounts with common beneficial ownership.

If the orders are for an omnibus account, they should determine whether the orders are for different customer accounts within the omnibus account. The firm employee or floor broker may choose to obtain a written statement from the entity carrying the omnibus account that states that such orders are placed only for different customers within the omnibus account. However, while this approach generally will be sufficient to satisfy Exchange requirements, there may be circumstances in which the Exchange or the CFTC find this approach insufficient and would expect the firm employee or floor broker to make further inquiries to determine whether the orders are for different owners.

Q4- **Why does a floor broker have to make any inquiry into the placement of buy and sell orders for simultaneous execution as opposed to relying on the member firm to make that inquiry?**

A4- The CFTC has held that because a floor broker is prohibited from knowingly participating in wash trades, he has an independent duty to inquire as to the propriety of such orders. (See, for example, *In the Matter of Three Eight Corporation.*)

It is not clear that the CFTC would find that the floor broker met his obligations in this regard if he asks the member firm representing the orders whether the orders are legally permissible and simply accepts the response of the member firm representative. There may be circumstances which would require a floor broker to go beyond mere acceptance of the member firm's assertion and take additional steps to ensure that the orders in question do not violate the prohibition on wash trades.

Q5- If a firm employee or floor broker cannot assure himself that buy and sell orders are for accounts with different beneficial ownership, what should he do?

A5- The firm employee or floor broker may refuse to accept the orders. If the orders are accepted, and assuming the parties have no knowledge of improper customer intent, regulatory risk may be mitigated by ensuring that there is a reasonable interval between the entry and execution of each order.

Q6- May a firm employee or floor broker accept a person's instruction directing that his position be liquidated and then re-established (i.e. freshening of position dates)?

A6- Provided that the customer does not require that the liquidation and re-establishment of the position be executed simultaneously, such orders may be accepted.

Note that CME Rule 807 ("Open Long Positions During Delivery Month") states that beginning on the day following the first day on which longs may be assigned delivery, all purchases and sales made in one day in the expiring contract by a person holding a long position in that contract must first be netted out as day trades with only the excess buys considered new longs or the excess sales being offsets of the long position. CBOT and NYMEX Rule 807 do not have a similar restriction regarding the freshening of dates during the delivery period. However, all such trades must be bona fide transactions executed competitively in the market and without prearrangement.

Q7- In the event buy and sell orders for accounts with common beneficial ownership are entered for a legitimate purpose, how should a firm employee or floor broker execute such orders in a manner consistent with the rules?

A7- In the open outcry market, the buy and sell orders should be timestamped immediately upon receipt. One of the orders should then be entered into the pit, executed and timestamped out prior to submitting the second order to the pit. The second order should be timestamped again when it is submitted to the pit. This methodology will ensure that the orders are not executed opposite each other, and the accurate timestamping will provide evidence that the orders were not entered for simultaneous execution.

In the electronic market, one of the orders should be entered on the electronic trading platform and executed in full prior to the entry of the second order. A written and timestamped record of the second order will be required because it was not entered on the electronic platform immediately upon receipt. This again will ensure that the orders are not executed opposite each other and will provide a clear audit trail with respect to the entry and execution of the orders.

Q8- Is regulatory risk mitigated by ensuring that there is a delay between the entry of buy and sell orders for accounts with common beneficial ownership?

A8- No. Simply ensuring that there is a delay between the entry of the buy and sell orders may not, depending on the terms of the orders, preclude the orders from trading in whole or in part against each other. To the extent that the orders match with each other, the result may be deemed an illegal wash trade irrespective of the fact that the orders were entered at different times.

A floor broker who executes such orders by buying and selling opposite the same party at the same price may also be found to have violated the prohibition on wash trades. Similarly, a person who knowingly accommodates the execution of such trades, either directly or indirectly may be found to have violated the prohibition on wash trades. Additionally, in certain circumstances such orders executed at nearly the same price, rather than at the same price, may violate the prohibition if it is demonstrated that the orders were structured to negate risk, for example by requiring that the price difference between the two orders be strictly limited.

Q9- **Is it acceptable for a firm employee to give both the buy order and the sell order to the same floor broker on a "DRT" basis?**

A9- If the floor broker executes the orders simultaneously or nearly simultaneously and achieves a wash result, it is possible that the firm, its employee and the floor broker will be the subject of an enforcement action brought by either the CFTC or the Exchange.

The entry of buy and sell orders for accounts with common beneficial ownership, coupled with discretion over the timing, may be viewed as an implicit request to the floor broker to negate the customer's market risk by directly or indirectly crossing the orders. The fact that the trade is not prearranged and is executed competitively may not protect the parties from liability if the execution of the orders produces a wash result.

Q10- **May a person or firm employee enter buy and sell orders for accounts with common beneficial ownership if the buy and sell orders are given to different firms or to different floor brokers for execution?**

A10- The potential for liability in this situation is significant. If the orders trade against each other in whole or in part, or if both orders are executed opposite the same third party, an inference may be drawn that there was intent to execute a prohibited wash trade.

Q11- **Under what circumstances is trading with oneself on the electronic platform a violation of exchange rules regarding wash trading?**

A11- Rule 534 provides that buy and sell orders for accounts with common beneficial ownership must be entered in good faith for the purpose of making bona fide transactions. Thus, it is a violation of 534 for a market participant to enter an order on the electronic system that he knew or should have known would match with a resting order on the other side of the market for an account with common beneficial ownership. Generally, an unintentional and incidental matching of such buy and sell orders will not be considered a violation of Rule 534. However, active traders who frequently enter orders on opposing sides of the market which may have a tendency to cross are strongly encouraged to employ functionality designed to minimize or eliminate their buy and sell orders from matching with each other.

Q12- **Is it considered a violation of Rule 534 if orders that are independently initiated by different proprietary traders within the same firm match against each other?**

A12- It is recognized that certain firms have proprietary trading operations in which various traders making fully independent trading decisions enter orders for the same beneficial owner (the firm's proprietary account) that coincidentally match with each other in the market. If the orders are entered without prearrangement such trades are not considered to be in violation of Rule 534. Firms should have and enforce policies to preclude affiliated traders trading for the same beneficial account who have knowledge of one another's orders from knowingly trading opposite one another's orders.

Q13- **Is it considered a violation of Rule 534 if orders initiated for accounts with common beneficial ownership by one or more automated trading systems match against each other?**

A13- If different automated trading algorithms for the same trading entity are operating in the same instrument and potentially may trade with one another, each such algorithm should be identified with a unique operator ID (also called a Tag 50 ID) tied to the individual or team of individuals that operate the system/algorithms. While it is not prohibited to run potentially conflicting algorithms simultaneously, if such trades cause price or volume aberrations, or occur frequently, the trading may be subject to particular scrutiny and may be deemed to violate Rule 534. Market participants are responsible for monitoring their automated trading systems and for employing trading algorithms that minimize the potential for the execution of transactions which are not exposed to market risk.

Q14- Do block trades between accounts of affiliated parties violate the wash trading prohibition?

A14- Block trades between the accounts of affiliated parties are permitted provided that 1) the block trade is executed at a fair and reasonable price; 2) each party has a legal and independent bona fide business purpose for engaging in the trade; and 3) each party's decision to enter into the block trade is made by an independent decision-maker. In the absence of satisfying the requirements above, the transaction may constitute an illegal wash trade prohibited by Rule 534.

CME Group

A CME/Chicago Board of Trade/NYMEX Company

June 9, 2010

Mr. David Stawick
Office of the Secretariat
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

RE: CME Group Market Regulation Advisory Notice RA1006-5
CME/CBOT/NYMEX/COMEX Submission No. 10-125

Dear Mr. Stawick:

Chicago Mercantile Exchange Inc. ("CME"), The Board of Trade of the City of Chicago, Inc. ("CBOT"), The New York Mercantile Exchange, Inc. ("NYMEX") and Commodity Exchange, Inc. ("COMEX") (collectively, the "Exchanges") hereby notify the Commodity Futures Trading Commission that they will issue CME Group Market Regulation Advisory Notice RA1006-5 on June 11, 2010.

The Notice provides additional guidance to market participants concerning Rule 538 ("Exchange for Related Positions"). The Notice clarifies that Exchange of Futures for Futures transactions are not a permissible form of EFRP on any CME Group exchange, provides additional guidance concerning transitory and non-transitory EFRPs, as well as the use of EFPs to facilitate inventory financing in storable agricultural commodities; the advisory also addresses EFRPs involving multiple legs on the exchange or related position component of the transaction.

A copy of the Notice begins on the next page of this submission.

The Exchanges certify that the Notice complies with the Commodity Exchange Act and regulations thereunder.

If you have any questions, please contact Robert Sniegowski, Market Regulation, at 312.341.5991 or me at 312.648.5422. Please reference CME/CBOT/NYMEX/COMEX Submission No. 10-125 in any related correspondence.

Sincerely,

/s/ Stephen M. Szarmack
Regulatory Counsel

MARKET REGULATION ADVISORY NOTICE

Exchange	CME, CBOT, NYMEX & COMEX
Subject	Exchange for Related Positions
Rule References	Rule 538
Advisory Date	June 11, 2010
Advisory Number	CME Group RA1006-5

This updated advisory is being issued to provide additional guidance to market participants with respect to Exchange for Related Positions ("EFRP") transactions. Rule 538, which governs EFRPs and is presented below, has not changed; however, the FAQ that begins on page 4 of this Advisory Notice includes additional interpretative guidance to address questions that have been raised by market participants.

Member firms are strongly encouraged to ensure that all firm employees, as well as customers on whose behalf the firms clear EFRPs, are fully informed of the requirements of Rule 538 and the interpretations in the associated FAQ.

<u>Rule 538 – ("Exchange for Related Positions")</u>

The following transactions shall be permitted by arrangement between parties in accordance with the requirements of this rule:

Exchange for Physical ("EFP") - A privately negotiated and simultaneous exchange of an Exchange futures position for a corresponding cash position.

Exchange for Risk ("EFR") – A privately negotiated and simultaneous exchange of an Exchange futures position for a corresponding OTC swap or other OTC instrument.

Exchange of Options for Options ("EOO") - A privately negotiated and simultaneous exchange of an Exchange option position for a corresponding OTC option position or other OTC instrument with similar characteristics.

For purposes of this rule, an EFP, EFR or EOO shall be referred to as an Exchange for Related Position ("EFRP").

538.A. Nature of an EFRP

An EFRP consists of two discrete but related simultaneous transactions. One party to the EFRP must be the buyer of (or the holder of the long market exposure associated with) the related position and the seller of the corresponding Exchange contract. The other party to the EFRP must be the seller of (or the holder of the short market exposure associated with) the related position and the buyer of the corresponding Exchange contract.

However, a member firm may facilitate, as principal, the related position on behalf of a customer, provided that the member firm can demonstrate that the related position was passed through to the customer who received the Exchange contract position as part of the EFRP.

538.B. Related Positions

The related position (cash, OTC swap, OTC option, or other OTC derivative) must involve the commodity underlying the Exchange contract, or must be a derivative, by-product, or related product of such commodity that has a reasonable degree of price correlation to the commodity underlying the Exchange contract.

538.C. Quantity

The quantity covered by the related position must be approximately equivalent to the quantity covered by the Exchange contracts.

538.D. Prices and Price Increments

An EFRP transaction may be entered into in accordance with the applicable price increments or option premium increments set forth in the rules governing the pertinent Exchange contracts, at such prices as are mutually agreed upon by the two parties to the transaction.

538.E. Date and Time of Transaction

The date and the time of execution of all EFRP transactions must be denoted on the record of the transaction required to be created pursuant to Rule 536.E. Notwithstanding the preceding sentence, EFRP transactions entered into CME ClearPort do not need a separate record of the transaction or time of execution provided that such transactions are entered immediately after the relevant terms have been determined during hours ClearPort is available, and in no event later than the earlier of the start of the next business day or the end of the permissible posting period for EFRP transactions following the expiration of the underlying futures contract.

538.F. Termination of Trading in Exchange Contracts

EFRP transactions may be permitted after termination of trading in expiring Exchange contracts, as prescribed in the applicable rules governing such Exchange contracts. Such transactions shall not establish new positions.

538.G. Identification and Submission to the Clearing House

Each EFRP transaction shall be designated as such and shall be cleared through the Clearing House. Each such transaction shall be submitted to the Clearing House within the time period and in the manner specified by the Exchange. Clearing member firms are responsible for exercising due diligence as to the bona fide nature of EFRP transactions submitted on behalf of customers.

538.H. Documentation

Parties to any EFRP transaction must maintain all documents relevant to the Exchange contract and the cash, OTC swap, OTC option, or other OTC derivative, including all documents customarily generated in accordance with relevant market practices and any documents reflecting payment and transfer of title. Any such documents must be provided to the Exchange upon request, and it shall be the responsibility of the carrying clearing member firm to provide such requested documentation on a timely basis.

538.I. Account Requirements

The accounts involved in the execution of an EFRP transaction must be (a) independently controlled accounts with different beneficial ownership; or (b) independently controlled accounts of separate legal entities with the same beneficial ownership, provided that the account controllers operate in separate business units; or (c) independently controlled accounts within the same legal entity, provided that the account controllers operate in separate business units; or (d) commonly controlled accounts of separate legal entities, provided that the separate legal entities have different beneficial ownership.

However, on or after the first day on which delivery notices can be tendered in a physically delivered Exchange futures contract, an EFRP transaction may not be executed for the purpose of offsetting concurrent long and short positions in the expiring Exchange futures contract when the accounts involved in such transaction are owned by the same legal entity and when the date of the Exchange futures position being offset is not the same as the date of the offsetting transaction.

538.J. Large Trader Requirements for EFRP Transactions

Each clearing member, omnibus account and foreign broker submitting large trader positions in accordance with Rule 561 must submit for each reportable account the EFRP volume bought and sold in the reportable instrument, by contract month, and additionally for EOOs, by put and call strike. The information must be included in the daily Large Trader report to the Exchange.

Questions regarding this Advisory Notice or the attached FAQ may be directed to the following individuals in Market Surveillance:

Shelley Spaner, Lead Analyst, 312.341.7051

Ryne Toscano, Lead Analyst, 212.299.2879

Steven Mair, Manager, 312.341.7034

Jerry O'Connor, Associate Director, 312.341.7048

For media inquiries concerning this Advisory Notice, please contact CME Group Corporate Communications at 312.930.3434 or news@cmegroup.com.

FAQ Related to Rule 538

Exchange for Related Positions

Q1: What are EFRP transactions?

A1: EFRP is an acronym for Exchange for Related Positions. Exchange for Physical ("EFP"), Exchange for Risk ("EFR") and Exchange of Options for Options ("EOO") transactions are collectively known as EFRP transactions.

An EFP transaction is a privately negotiated and simultaneous exchange of a futures position for a corresponding cash market position in the same or a related cash instrument.

An EFR transaction is a privately negotiated and simultaneous exchange of a futures position for a corresponding OTC swap or other OTC derivative in the same or a related instrument.

An EOO transaction is a privately negotiated and simultaneous exchange of an exchange-traded option position for a corresponding OTC option position or other OTC contract with similar characteristics in the same or a related instrument.

Q2: Do CME Group exchanges permit Exchange of Futures for Futures (EFF) transactions?

A2: No. Contract markets are required to provide a competitive, open and efficient market for executing transactions. In addition to other provisions in the Commodity Exchange Act and Commission regulations governing noncompetitive trades, noncompetitive trades may be executed only if such trades are expressly permitted by the written rules of the contract market on which the trades are executed.

Rule 538 does not allow for the execution of EFF transactions on any CME Group exchange. Therefore, in no case can a futures contract be used as the related position component of an EFRP transaction.

Q3: What is the difference between EFRP transactions and "Ex-Pit" transactions?

A3: The term "Ex-Pit Transaction" refers broadly to transactions that exchange rules permit to be executed noncompetitively outside of the central market. Such transactions are also sometimes referred to as PNTs ("Privately Negotiated Transactions"). Permissible ex-pit transactions include EFRPs, block trades and transfer trades. EFRPs are addressed in Rule 538; block trades are addressed in Rule 526, and transfer trades are addressed in Rule 853.

Q4: Is there a difference between EFP transactions and transactions commonly referred to as "Cash for Futures", "Versus Cash" or "Against Actuals"?

A4: No. All of the referenced terms describe transactions that CME Group refers to as EFPs.

Q5: Can an EFRP be executed in any of the CME Group exchanges' futures and options contracts?

A5: EFRPs may be executed in any of the CME Group exchanges' futures and options contracts provided that the transaction conforms to the requirements of Rule 538 and associated advisories, as well as any applicable CFTC requirements.

Q6: Can there be more than two parties to an EFRP transaction?

A6: Typically, there may be only two parties involved in an EFRP transaction. One party must be the buyer of (or the holder of the long market exposure associated with) the cash or OTC position and the seller of (or the holder of the short market exposure associated with) the corresponding Exchange contract. The other party must be the seller of (or the holder of the short market exposure associated with) the cash or OTC position and the buyer of (or the holder of the long market exposure associated with) the corresponding Exchange contract. Multi-party EFRPs are prohibited except as provided below.

A member firm may facilitate, as principal, the transfer of the related position component of an EFRP transaction on behalf of a customer provided that the member firm can demonstrate that the related position was passed through to the customer who received the exchange position as part of the transaction.

Q7: Are there restrictions with respect to who may execute an EFRP transaction?

A7: EFR and EOO Transactions – Participants to EFR and EOO transactions must comply with applicable CFTC regulatory requirements governing eligibility to transact the OTC component of the EFR or EOO. Market participants should be mindful of CFTC Regulations Part 32-Regulation of Commodity Option Transactions and Part 35-Exemption of Swap Agreements and, in particular, should consult appropriate counsel to determine whether they are eligible to enter into OTC options transactions.

EFP Transactions – Each EFP transaction includes a bona fide cash market transaction, and these transactions therefore typically will be transacted by commercial market participants who customarily transact business in the relevant cash market. As such, EFPs conducted by non-commercial participants will be subject to additional scrutiny to validate the bona fide nature of the cash market transaction.

Q8: Are there restrictions on the execution of EFRPs between affiliated accounts?

A8: The accounts involved in the execution of an EFRP must be:

a) independently controlled accounts with different beneficial ownership; or

b) independently controlled accounts of separate legal entities with the same beneficial ownership, provided that the account controllers operate in separate business units; or

c) independently controlled accounts within the same legal entity provided that the account controllers operate in separate business units; or

d) commonly controlled accounts of separate legal entities provided that the separate legal entities have different beneficial ownership.

The term "same beneficial ownership" means a parent and its wholly owned subsidiaries or subsidiaries that are wholly owned by the same parent.

If the parties to a transaction involve the same legal entity, same beneficial owner, or separate legal entities under common control, then the parties must be able to demonstrate that the EFRP had legitimate economic substance for each party to the trade.

Q9: In which products are transitory EFRPs permitted?

A9: Transitory EFRPs are EFRPs in which two parties contemporaneously execute an EFRP transaction and an additional cash or OTC transaction that offsets the cash or OTC component of the EFRP; such transactions are permitted exclusively in NYMEX energy and metals products, COMEX metals products, and CME foreign exchange ("FX") products.

For example, Party A sells an OTC swap to Party B and contemporaneously executes an EFR whereby Party A sells futures and buys an offsetting OTC swap opposite Party B. All documents typically generated in accordance with OTC market conventions must be generated and maintained for each of the OTC transactions. In the example where the related position component of the EFR is a swap, the master swap agreement, if such agreement exists, or the confirmation supplied by the broker must be retained to substantiate the bona fide nature of the transaction. The books of the respective parties must also reflect the execution of the OTC transactions.

With respect to transitory EFRPs in FX products, Market Regulation would expect to see documentation generated by the participating broker/dealer for each leg of the offsetting cash transactions consistent with that produced for "stand-alone" OTC transactions of the same type. Additionally, the entities involved in the transaction must have the ability to deal in the OTC instrument; for example, the OTC components of a transitory EFRP involving a restricted currency would be structured as non-deliverable forwards.

Documentation generated to support these transactions should identify the counterparty to the transaction either by account number or name. However, in circumstances where the EFRP is transacted between an FX broker/dealer and a CTA, account controller or other person acting on behalf of a third party (such as a commodity pool or fund), the documentation must, at a minimum, uniquely identify the particular EFRP transaction and allow for its subsequent association with additional documentation which contains the identification of the third party by name or account number.

All other Exchange and CFTC requirements regarding EFRP transactions must be adhered to in connection with the execution of transitory EFRP transactions.

Q10: In products in which transitory EFRPs are not permitted, can a swap be negotiated to settle via an EFR?

A10: Yes, parties to a swap may agree to settle a swap via an EFR. However, at the time of origination, the prices of the swap and the EFR may not be pre-negotiated such that market risk is negated.

Q11: Is there a specified minimum time period for which the initiating swap must be in force before it is unwound such that the EFR would not be considered transitory?

A11: While the length of the time between the transactions may be a consideration in assessing whether the EFRP is transitory, the legitimacy of the transactions will be evaluated based on whether the transactions have integrity as independent transactions exposed to market risk that is material in the context of the transactions. Transactions that do not meet this test are considered prearranged futures trades that circumvent the open market execution requirement.

Q12: Can two EFPs be utilized to facilitate inventory financing in storable agricultural commodities?

A12: The following transaction is permitted provided that it is entered into for the purpose of obtaining inventory financing for a storable agricultural commodity. A participant may purchase the agricultural commodity and sell the equivalent quantity of futures contracts to a counterparty through the execution of an EFP and may grant to the counterparty the non-transferable right to effect a second EFP on some date certain in the future which will have the effect of reversing the original EFP.

Q13: Can an EFRP be executed to either initiate or offset a position? If so, are there any restrictions during the delivery period for physically delivered products?

A13: EFRP transactions generally can be used to either initiate or offset futures and/or cash/OTC positions. The two exceptions are described below:

On or after the first day on which delivery notices can be tendered in a physically delivered contract, an EFRP cannot be executed for the purpose of offsetting concurrent long and short positions in the expiring futures contract when the accounts involved in the transaction are owned by the same legal entity and when the date of the futures position being offset is not the same as the date of the offsetting transaction.

Additionally, after trading has ceased in an expiring contract, EFRP transactions in certain products may be permitted for liquidating purposes only and for a defined period of time as prescribed in the applicable product chapter of the relevant exchange's rulebook.

Q14: Can an EFRP incorporate multiple legs on the exchange component of the transaction or incorporate multiple legs on the related position component of the EFRP?

A14: An EFRP may incorporate multiple exchange-traded components provided that all of the components have the same market bias (long or short). For example, a Eurodollar strip versus equivalent exposure in an interest rate swap may be executed as an EFR.

An EFRP may incorporate multiple related position components provided that the net exposure of the related position components is approximately equivalent to the quantity of futures exchanged or, in the case of an EOO, the net delta-adjusted quantity of the OTC option components is approximately equivalent to the delta of the exchange-traded options exchanged.

In all cases, market participants must be able to demonstrate this equivalency and produce all relevant documentation upon request.

Q15: Are there restrictions on the price at which an EFRP transaction may be executed?

A15: The exchange-traded futures or options leg of an EFRP may be executed at any commercially reasonable price agreed upon by both parties, provided that the price of the contract conforms to the standard minimum tick increment as set forth in the rules of the relevant product chapter. Transactions executed away from prevailing market prices can be expected to be subject to additional regulatory scrutiny.

Q16: What are the hours of trading for EFRP transactions?

A16: EFRPs may be executed at any time. However, an EFRP transaction is not considered as having been accepted by the Clearing House until the transaction is matched and cleared, and the first payment of settlement variation and performance bond has been confirmed.

Q17: If an EFRP is submitted via Front-End Clearing (FEC), how soon after execution must the EFRP be submitted?

A17: <u>CME and CBOT Products</u>

For EFRPs executed between 6:00 a.m. and 6:00 p.m. Central Time, firms must submit the trade within one hour. For EFRPs executed between 6:00 p.m. and 6:00 a.m., Central Time, firms must submit the trade no later than 7:00 a.m. Central Time.

<u>NYMEX and COMEX Products</u>

For EFRPs executed between 7:00 a.m. and 5:45 p.m. Eastern Time, the trades must be submitted within one hour. For EFRPs executed between 5:45 p.m. and 7:00 a.m., Eastern Time, the trades must be submitted prior to 8:00 a.m. Eastern Time.

Q18: How do I properly record the execution time and date when submitting an EFRP via Front-End Clearing (FEC)?

A18: For CME and CBOT products, the clearing system will automatically assign the current date as the trade date if the EFRP is entered prior to 4:00 p.m. Central Time. Entries made after 4:00 p.m. will default to the next trade date. Users may manually change the trade date to the current date if the EFRP is entered prior to 7:00 p.m. Central Time.

For NYMEX and COMEX products, the clearing system will automatically assign the current date as the trade date if the EFRP is entered prior to 2:45 p.m. Eastern Time. Entries made after 2:45 p.m. will default to the next trade date. Users may manually change the trade date to the current date if the EFRP is entered prior to 7:45 p.m. Eastern Time.

Rule 538 requires the submission of the execution time for each EFRP transaction submitted via FEC. The execution time must be the actual time at which the transaction was concluded by the two parties, not the time at which the trade was reported by the parties to their respective firms or the Exchange. Thus, if the member or clearing member has not acted as either principal or agent in the transaction, it must ensure that the customer provides an accurate execution time.

EFRPs entered by members and their employees on the NYMEX/COMEX trading floor via the Clearing System Broker User Interface should be entered in Eastern Time.

EFRPs entered into Front-End Clearing by firm staff or from other locations should be entered in Central Time.

For additional information, please refer to the Front End Clearing Guide referenced in the answer to Question 20 below.

Q19: If the EFRP is submitted via CME ClearPort, what are the execution time and recordation requirements?

A19: Generally, EFRPs must be submitted to CME ClearPort within one hour after the relevant terms have been determined. If the relevant terms are determined at a time when CME ClearPort is unavailable (from 5:15 p.m. – 6:00 p.m. Eastern Time and on weekends), the EFRP must be submitted within one hour of the time that CME ClearPort next becomes available. EFRPs may not, under any circumstances, be posted later than the end of the permissible posting period for EFRP transactions following the expiration of the underlying futures contract.

EFRP transactions entered via CME ClearPort do not require a separate time of execution provided that they are entered into CME ClearPort immediately upon execution. If such transactions are not entered immediately, the date and the time of execution of the EFRP transaction must be recorded on the record of the transaction required to be created pursuant to Rule 536.E.

Q20: How are EFRPs submitted to the Clearing House?

A20: For information regarding the submission of EFRPs using Front End Clearing, please contact Clearing Services at 312.207.2525 or via email at ccs@cmegroup.com.

To obtain a copy of the Front End Clearing (FEC) User Guide, please contact Client Management Training Services at 312.930.4523 or via email at cmts@cmegroup.com.

For information regarding the submission of EFRPs using CME ClearPort, please contact CME ClearPort Market Operations at 1-800-438-8816 or via email at CustCare@cmegroup.com

Q21: Can EFRPs be average priced?

A21: Yes. EFRP transactions designated for Average Pricing System (APS) allocation must conform to the requirements of Rules 553 and 538.

Q22: Must a broker be specified when submitting EFRPs to the Clearing System?

A22: Direct entry of an EFRP into Front-End Clearing does not require the entry of a broker for the transaction.

Entry of EFRPs by members and their employees on the NYMEX trading floor via the Clearing System Broker User Interface require information identifying the party entering the transaction.

Entry of EFRPs through CME ClearPort Clearing by a registered user requires that the "Broker Firm" and "Broker Name" fields be populated.

Q23: What types of instruments are considered acceptable for use as the related position side of EFRPs and what are the equivalency requirements with respect to the quantities exchanged?

A23: The related position (i.e. cash, swap or other OTC derivative) must involve the product underlying the exchange contract or a derivative, by-product or related product that is reasonably correlated to the exchange instrument being exchanged. Market Regulation may request that the parties to an EFRP transaction demonstrate that the related position and the exchange position are reasonably correlated.

The quantity of the exchange contract(s) being exchanged must be approximately equivalent to the quantity of the related position(s) being exchanged. Upon request, the parties to an EFRP transaction must be able to demonstrate such equivalency.

Generally acceptable related position instruments for EFRPs for different product groups include, but are not limited to, the following:

Foreign Exchange Contracts: Instruments considered acceptable as the related position side of an FX EFRP transaction may include spot, forwards, FX or cross-currency basis swaps, OTC FX options, swaptions, non-deliverable forwards ("NDFs"), currency baskets and Exchange Traded Funds ("ETFs"). The historical correlation between the related position instrument and the corresponding currency pair or index component of an EFRP must be 80% or greater. The acceptability of instruments settled in a currency other than those comprising the underlying pair should be addressed with Market Regulation staff prior to engaging in the transaction.

Interest Rate Contracts: Fixed income instruments with risk characteristics and maturities that parallel the instrument underlying the exchange contract are acceptable. Such instruments include, but are not necessarily limited to, money market instruments, Treasuries, Agencies, investment grade corporates, forward rate agreements (FRAs), mortgage instruments including collateralized mortgage obligations (CMOs) and interest rate swaps and swaptions.

Stock Index Contracts: Stock baskets must be highly correlated to the underlying index with a historical correlation to the index of 90% or greater ($r \geq .90$). Further, these stock baskets must represent at least 50% of the underlying index by weight or must include at least 50% of the stocks in the underlying index. The notional value of the basket must be approximately equal to the value of the corresponding exchange contract. ETFs are acceptable provided that the ETF mirrors the relevant Exchange stock index product.

Agricultural Contracts: For Dairy Products, Live Cattle, Feeder Cattle, Lean Hogs and Pork Bellies, the acceptable related position component of an EFP is limited to the specific underlying commodity (e.g., Live Cattle for Live Cattle futures); although the related position need not be deliverable grade of the particular commodity, there must be a reasonable level of correlation with the associated futures. In the case of Random Length Lumber futures, the related position must be deliverable species dimension lumber, variances are permitted with respect to grade/size and tally. Additionally, with respect to Random Length Lumber, the buyer of the cash lumber must retain ownership of the transferred product for personal use or resale to customers and may not resell the product either directly or indirectly to the original seller.

For all other agricultural futures contracts, the related position must involve the commodity underlying the futures contract or a derivative, by-product or related product that is reasonably correlated to the futures being exchanged. The related position in an EFR or EOO may be an agricultural commodity swap or other agricultural OTC instrument, but in all cases must comply with any applicable regulatory requirements prescribed by the CFTC.

Commodity Index Contracts: For exchange contracts based on Commodity Indexes, (*e.g.*, Goldman Sachs Commodity Index (GSCI), Dow UBS Index), acceptable related positions include ETFs provided that the ETF mirrors the relevant Commodity Index product traded on the Exchange.

Energy Contracts: For energy contracts, the acceptable related position component for an EFP is limited to the specific underlying commodity (e.g. Natural Gas for Natural Gas Futures); although the related position need not be deliverable grade of the particular commodity, there must be a reasonable level of correlation with the associated futures. The related position in an EFR or EOO may be an energy swap or OTC swap/option instrument.

Metals Contracts: For metals contracts, the acceptable related position component for an EFP is limited to the specific underlying commodity (e.g. Gold for Gold Futures); although the related position need not be deliverable grade of the particular commodity, there must be a reasonable level of correlation with the associated futures. The related position in an EFR or EOO may be a swap or OTC swap/option instrument. Exchange Traded Funds ("ETFs") are acceptable provided that the ETF mirrors the relevant Exchange metal product.

In all cases, the associated related position transactions must be comparable with respect to quantity, value or risk exposure to the exchange contract.

Questions regarding the acceptability of related position instruments may be addressed to the Market Regulation contacts listed on this Advisory Notice.

Q24: Does a firm that executes and/or clears an EFRP on behalf of a customer have any regulatory exposure if the EFRP does not conform to the requirements of Rule 538?

A24: A firm that executes and submits an EFRP on behalf of a customer is responsible for exercising due diligence as to the bona fide nature of the EFRP. Failure to do so may be deemed a violation of Rule 538 by the firm. Additionally, a firm that accepts and clears an EFRP that is given-up may be liable for violation of Rule 538 if it accepts an EFRP that it knows, or should know, is not bona fide.

Q25: What are the documentation requirements for EFRPs?

A25: Parties to an EFRP must maintain all documents relevant to the exchange contract and related position transactions and must provide such documents to Market Regulation upon request. Documents that may be requested include, but are not limited to, the following:

All documents relevant to the exchange component of the trade including order tickets (or other electronically time-stamped record) and account statements;

Documentation customarily generated in accordance with cash market or other relevant market practices such as signed swap agreements, OTC contracts, cash confirmations, invoices, warehouse receipts and bills of sale, as well as documentation that demonstrates proof of payment and transfer of ownership of the related position transaction (e.g. canceled checks, bank statements, Fedwire confirms, Fixed Income Clearing Corporation documents, bills of lading etc.).

Market Regulation may also request emails, instant messages, voice-recordings and other such communications related to the negotiation, execution and confirmation of EFRP transactions.

Q26: Must transactions executed as EFRPs be reflected as such on customer account statements?

A26: Yes, FCMs must accurately identify EFRP transactions on confirmation and monthly account statements delivered to customers.

Q27: Who is responsible for submitting related position documentation when a request for such documentation is made by the Market Regulation Department?

A27: Related position documentation for an EFRP must be provided to the Market Regulation Department upon request. Market Regulation will request such information from the firm carrying the account, and the carrying firm is responsible under the rules for providing the documentation.

Q28: What information regarding EFRPs must be submitted in a firm's daily Large Trader position file?

A28: Pursuant to Rule 561.A., a firm's daily Large Trader position file must include for each reportable account the EFRP volume bought and sold in the reportable instrument, by contract month, and for EOOs by put and call strike.

CME Group
A CME/Chicago Board of Trade/NYMEX Company

April 1, 2010

Mr. David Stawick
Office of the Secretariat
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21st Street, N.W.
Washington, DC 20581

RE: CME/CBOT/NYMEX/COMEX Rule 539 ("Prearranged, Pre-Negotiated and Noncompetitive Trades Prohibited") and CME Group Market Regulation Advisory Notice RA1004-5
CME/CBOT/NYMEX/COMEX Submission No. 10-088

Dear Mr. Stawick:

Chicago Mercantile Exchange Inc. ("CME"), The Board of Trade of the City of Chicago, Inc. ("CBOT"), The New York Mercantile Exchange, Inc. ("NYMEX") and Commodity Exchange, Inc. ("COMEX") (collectively, the "Exchanges") hereby notify the Commodity Futures Trading Commission that they are adopting amendments to Rule 539 ("Prearranged, Pre-Negotiated and Noncompetitive Trades Prohibited") effective Sunday, April 18 (for trade date Monday, April 19). The changes concern the requirements for engaging in allowable pre-execution communications in all CME, NYMEX and COMEX options and in CBOT Interest Rate, Ethanol and Dow options trading on CME Globex®.

As of April 18, pre-execution communications in the above-referenced options products will no longer require that a Request for Quote ("RFQ") be entered into CME Globex prior to engaging in the pre-execution communication, but will continue to require the entry of an RFQ prior to the entry of the associated Request for Cross ("RFC") order.

Additionally, the matching algorithm currently applicable to RFC transactions in CME and CBOT equity options will be extended to RFC transactions in all eligible options. The revised requirements continue to ensure transparency and competitive execution by requiring solicitation of interest from all market participants via an RFQ prior to submission of the RFC order. Further details on the changes are set forth in the attached CME Group Market Regulation Advisory Notice RA1004-5 that the Exchanges will issue on Tuesday, April 6, 2010. No changes are being made to the requirements concerning allowable pre-execution communications in futures products.

The changes to Rule 539 appear on the next page, with additions underscored and deletions overstruck. A copy of the Advisory Notice follows the rule changes.

The Exchanges certify that the amendments to Rule 539 and the Advisory Notice comply with the Commodity Exchange Act and regulations thereunder.

If you have any questions regarding the rule amendments or the Advisory Notice, please contact Robert Sniegowski, Market Regulation, at 312.341.5991 or me at 312.338.2483. Please reference CME/CBOT/NYMEX/COMEX Submission No. 10-088 in any related correspondence.

Sincerely,

/s/ Lisa Dunsky
Director and Associate General Counsel

CME & NYMEX

539. PREARRANGED, PRE-NEGOTIATED AND NONCOMPETITIVE TRADES PROHIBITED

539.A. General Prohibition

No person shall prearrange or pre-negotiate any purchase or sale or noncompetitively execute any transaction, except in accordance with Sections B. and C. below.

539.B. Exceptions

The foregoing restriction shall not apply to block trades pursuant to Rule 526 or Exchange for Related Positions transactions pursuant to Rule 538.

539.C. Pre-Execution Communications Regarding Globex Trades

Parties may engage in pre-execution communications with regard to transactions executed on the Globex platform where one party (the first party) wishes to be assured that a contra party (the second party) will take the opposite side of the order under the following circumstances:

1. A party may not engage in pre-execution communications with other market participants on behalf of another party unless the party for whose benefit the trade is being made has previously consented to permit such communications.
2. Parties to pre-execution communications shall not (i) disclose to a non-party the details of such communications or (ii) enter an order to take advantage of information conveyed during such communications except in accordance with this rule.
3. In the case of futures orders, the first party's order must be entered into the Globex platform first and the second party's order may not be entered into the Globex platform until a period of 5 seconds has elapsed from the time of entry of the first order.
4. In the case of options orders, subsequent to the~~a~~ pre-execution communication, ~~must be preceded by the submission of~~ a Request for Quote ("RFQ") for the particular option or option spread or combination must be entered into Globex. ~~Subsequent to such RFQ, a trade intended for execution for which there has been a preexecution communication requires the entry of an additional RFQ; t~~Thereafter, a Request for Cross ("RFC") order which contains both the buy and the sell orders must be entered into Globex no less than fifteen (15) seconds and no more than thirty (30) seconds after the entry of the ~~additional~~ RFQ in order to proceed with the trade, except in equity options where the RFC order must be entered no less than five (5) seconds and no more than thirty (30) seconds after the entry of the ~~additional~~ RFQ. The RFQs and the RFC order must be entered within the same trading session. Failure to enter the RFC order within 30 seconds after the entry of the ~~additional~~ RFQ will require a new RFQ to be entered prior to the entry of the RFC order, which must be entered in accordance with the time parameters described above in order to proceed with the trade.

CBOT

539. PREARRANGED, PRE-NEGOTIATED AND NONCOMPETITIVE TRADES PROHIBITED

539.A. General Prohibition

No person shall prearrange or pre-negotiate any purchase or sale or noncompetitively execute any transaction, except in accordance with Sections B. and C. below.

539.B. Exceptions

The foregoing restrictions shall not apply to block trades pursuant to Rule 526 or Exchange for Related Positions transactions pursuant to Rule 538.

539.C. Pre-Execution Communications Regarding Globex Trades in Interest Rate, Ethanol and Dow Options

Parties may engage in pre-execution communications with regard to Interest Rate, Ethanol and Dow options transactions executed on the Globex platform where one party wishes to be assured that a contra party will take the opposite side of the order under the following circumstances:

1. A party may not engage in pre-execution communications with other market participants on behalf of another party unless the party for whose benefit the trade is being made has previously consented to permit such communications.
2. Parties to pre-execution communications shall not (i) disclose to a non-party the details of such communications or (ii) enter an order to take advantage of information conveyed during such communications except in accordance with this rule.
3. Reserved.
4. ~~A pre-execution communication must be preceded by the submission of a Request for Quote ("RFQ").~~

   Subsequent to the pre-execution communication, a Request for Quote~~such~~ ("RFQ")~~, a trade intended for execution for which there has been a pre-execution communication requires the entry of an additional RFQ~~for the particular option or option spread or combination must be entered into Globex.~~;~~ ~~t~~Thereafter, a Request for Cross ("RFC") order which contains both the buy and the sell orders must be entered into Globex no less than fifteen (15) seconds and no more than thirty (30) seconds after the entry of the ~~additional~~ RFQ in order to proceed with the trade, except in equity options where the RFC order must be entered no less than five (5) and no more than thirty (30) seconds after the ~~additional~~ RFQ. The RFQ~~s~~ and the RFC order must be entered within the same trading session. Failure to enter the RFC order within 30 seconds after the entry of the ~~additional~~ RFQ will require a new RFQ to be entered prior to the entry of the RFC order, which must be entered in accordance with the time parameters described above in order to proceed with the trade.

MARKET REGULATION ADVISORY NOTICE

Exchange	CME, CBOT, NYMEX & COMEX
Subject	Pre-Execution Communications
Rule References	Rule 539
Advisory Date	April 6, 2010
Advisory Number	CME Group RA1004-5
Effective Date	April 18, 2010

This Advisory Notice supersedes CME Group Market Regulation Advisory Notice RA0903-5 issued on August 28, 2009. It is being reissued to reflect changes to the requirements governing options trades in eligible products that are executed on CME Globex pursuant to pre-execution communications.

Pre-execution communications are communications between market participants for the purpose of discerning interest in the execution of a transaction prior to the exposure of the order to the market. Any communication that involves discussion of the size, side of market or price of an order, or a potentially forthcoming order, constitutes a pre-execution communication.

Effective on Sunday, April 18 (for trade date Monday, April 19), pre-execution communications in eligible options products will no longer require that a Request for Quote ("RFQ") be entered into CME Globex prior to engaging in the pre-execution communication, but will continue to require the entry of an RFQ prior to the entry of the associated Request for Cross ("RFC") order.

Additionally, the matching algorithm currently applicable to RFC transactions in CME and CBOT equity options will be extended to RFC transactions in all eligible options. No changes are being made to the requirements concerning allowable pre-execution communications in futures products.

Additional information on the revised requirements for options transactions executed pursuant to pre-execution communications begins on page 2 of this Advisory Notice.

As a reminder, CME, CBOT, NYMEX and COMEX rules expressly prohibit pre-execution communications in connection with pit transactions executed on the trading floor. Additionally, CBOT rules prohibit pre-execution communications in all CBOT futures contracts and CBOT agricultural options contracts traded on CME Globex.

General Requirements for Allowable Pre-Execution Communications on CME Globex

In products where pre-execution communications are allowed, such communications may occur only when the party for whose benefit the trade is being executed has previously consented to such communications.

Additionally, parties who have been involved in a pre-execution communication may not disclose the details of that communication to other parties, nor may a party place any order to take advantage of the information conveyed in such communications except to facilitate the trade in accordance with the rule.

All transactions arising from permitted pre-execution communications must be executed in accordance with the requirements set forth in Rule 539.C.

Pre-Execution Communications in Futures on CME Globex

Pre-execution communications are permitted in all CME, NYMEX and COMEX futures products traded on CME Globex and are prohibited in all CBOT futures products traded on CME Globex.

For transactions in CME, NYMEX and COMEX futures products which involve pre-execution communications, the order of the party who initiated the pre-execution communication must be the first order entered into CME Globex. At least 5 seconds must elapse after the entry of the first order before the opposing order can be entered. No RFQ is required.

Pre-Execution Communications in Options on CME Globex

Pre-execution communications are permitted in all CME, NYMEX and COMEX options products traded on CME Globex and are permitted in CBOT Interest Rate, Ethanol and Dow options traded on CME Globex. Pre-execution communications are prohibited in all CBOT agricultural options traded on CME Globex.

Opposing buy and sell orders intended for execution pursuant to a pre-execution communication in an eligible options product (including options spreads and combinations and options/futures spreads) require the entry of an RFC order, which is an order that includes both the buy and sell orders arising from the pre-execution communication. Prior to the entry of the RFC, an RFQ must be entered into CME Globex for the relevant option or options strategy. In CME and CBOT equity options, the RFC order must be entered no less than 5 seconds and no more than 30 seconds after the entry of the RFQ. In all other eligible options, the RFC order must be entered no less than 15 seconds and no more than 30 seconds after the entry of the RFQ.

Failure to enter the RFC order within the applicable time parameters will require a new RFQ to be entered prior to the entry of the RFC order. In all cases, the entry of the RFC order must comply with the applicable time parameters set forth in Rule 539. These requirements ensure transparency and competitive execution by requiring solicitation of interest from all market participants via an RFQ prior to submission of the RFC order.

Numerous Independent Software Vendors support RFQ and RFC functionality. For market participants using the Exchange-provided CME EOS Trader application, functionality built into the application will prevent the entry of the RFC outside of the prescribed time requirements. For example, in Eurodollar options, the system will preclude the entry of the RFC until at least 15 seconds after the entry of the associated RFQ and will also prevent the entry of the RFC if more than 30 seconds have elapsed following the entry of the RFQ. This functionality was added to facilitate compliance with the relevant entry time requirements.

Market participants engaging in pre-execution communications involving options must be able to enter the required RFQ and RFC or have another party enter the required RFQ and RFC on their behalf as it is impermissible to enter the orders to be crossed via separate entries into CME Globex and remain in compliance with Rule 539.C.

Further information on the relevant rules and requirements related to pre-execution communications is included on pages 3-7.

The text of CME, NYMEX and COMEX Rule 539 appears on page 8 and the text of CBOT Rule 539 appears on page 9 of this Advisory Notice.

1. Requirements for Pre-Execution Communications in Eligible Option Products

a) Pre-execution communications are permitted in all options products except for CBOT agricultural options.

b) Prior to the entry of orders arising from pre-execution communications, the market participant ***must*** submit an RFQ.

c) Subsequent to submitting the RFQ, the orders to be executed pursuant to such communications ***must*** be initiated by the entry of an RFC order, an order which includes both the buy and sell orders arising from the pre-execution communications.

In CME and CBOT Equity options, the RFC order ***must*** be entered no less than 5 seconds and no more than 30 seconds after issuing the RFQ.

In all other eligible options, the RFC order ***must*** be initiated no less than 15 seconds and no more than 30 seconds after issuing the RFQ.

d) If an RFC order is not entered within 30 seconds after the RFQ, any subsequent trade to be executed pursuant to pre-execution communications must be preceded by the entry of a new RFQ and, thereafter, the RFC order must be entered in accordance with the time parameters set forth above.

2. RFC Matching Algorithm

a) **The RFC price improves both the best bid and best offer in the order book or there is no bid/offer in the order book.**

If the RFC price improves both the best bid and best offer in the order book or if there is no bid/offer in the order book, 100% of the RFC quantity will match at the RFC price immediately upon submission of the RFC.

b) **The RFC price matches or is outside the best bid or best offer in the order book.**

If the RFC price matches or is outside the best bid or offer in the market, the applicable side of the RFC order will immediately match against the orders in the book at a price better than or equal to the RFC price.

Immediately thereafter, 100% of the smaller quantity remaining on one side of the RFC will match against the order on the opposite side of the RFC at the RFC price.

Any unmatched balance on one side of the RFC will remain in the order book unless it is cancelled by the user.

3. Questions and Answers Regarding Pre-Execution Communication Requirements in Eligible Options Executed on CME Globex

a) Is a client's consent to pre-execution communications necessary?
Yes.

b) May the parties involved in pre-execution communications disclose the details of those communications to other parties?
No.

c) If a party has participated in a pre-execution communication where non-public information has been disclosed about an order or a potential order and the party does not agree to take the other side of the trade, may the party subsequently enter an order into the market to take advantage of the non-public information?
No.

d) Are there any options listed on CME Globex in which pre-execution communications are not permitted?
Yes, pre-execution communications are not permitted in CBOT agricultural options, but are permitted in all other options available for trading on CME Globex.

e) Is an RFQ required to be submitted prior to engaging in pre-execution communications?
No.

f) After a pre-execution communication has taken place, must an RFQ be submitted prior to entering a Request for Cross ("RFC") in order to proceed with the transaction?
Yes.

g) In all eligible options other than equity options, must the RFC be entered no less than 15 seconds and no more than 30 seconds after issuing the RFQ?
Yes.

h) In CME and CBOT equity options, must the RFC be entered no less than 5 seconds and no more than 30 seconds after issuing the RFQ?
Yes.

i) Is the price or quantity of the orders on the RFC displayed to the marketplace prior to the execution of the RFC?
No. Market participants will observe an RFQ prior to the submission of the buy and sell orders corresponding to the RFC; however the RFQ will not reflect a price or quantity.

j) Is there any information in the RFQ that identifies that a RFC may be forthcoming?
No. The RFQ is displayed in the same manner as any other RFQ.

k) If the RFC is not entered within the required time parameters after issuing the RFQ, is a new RFQ required to be issued and active for the required time parameter prior to entering the RFC?
Yes.

l) May an RFC be entered outside the time parameters set forth in g) and h) above after entry of the required RFQ?
No.

m) Are there any alternative methods of complying with Rule 539.C. other than through the entry of an RFQ followed by the entry of an RFC as described above?
No.

4. Questions and Answers Regarding Pre-Execution Communication Requirements in Eligible Futures Products Executed on CME Globex

a) Is a client's consent to pre-execution communications necessary?
Yes.

b) May the parties involved in pre-execution communications disclose the details of those communications to other parties?
No.

c) If a party has participated in a pre-execution communication where non-public information has been disclosed about an order or a potential order and the party does not agree to take the other side of the trade, may the party subsequently enter an order into the market to take advantage of the non-public information?

No.

d) Are there any futures listed on CME Globex in which pre-execution communications are <u>not</u> permitted?
Yes, pre-execution communications are <u>not</u> permitted in CBOT futures products, but are permitted in all other futures available for trading on CME Globex.

e) Is an RFQ required to be issued prior to engaging in pre-execution communications involving futures?

No.

f) If pre-execution communications have occurred in an eligible futures contract, must the order of the initiator of the pre-execution communication be entered prior to the entry of the opposing order?

Yes.

g) Must a minimum of 5 seconds elapse after the entry of the first order before the entry of the second order?

Yes.

h) Can an RFC be used to cross futures orders?
No.

5. <u>Questions and Answers Regarding Products in Which Pre-Execution Communications on CME Globex are Prohibited</u>

a) In which products are pre-execution communications prohibited?
Pre-execution communications are prohibited in all CBOT futures products and all CBOT agricultural options products.

b) If a customer has an interest in a particular transaction in these products and requests a market, how can the salesperson obtain a market for the customer?

In the open outcry venue, a market would be requested from the trading pit. In the electronic venue, the salesperson identifies the bid/offer and depth of market posted on CME Globex. If the posted bid/offer is deemed too wide or insufficiently deep, it is recommended that a Request for Quote ("RFQ") be submitted. This action will typically generate additional interest and, in the case of products supported by a market-maker program, market makers are obliged to respond to a specified percentage of RFQs.

c) What if an RFQ is submitted and there is no response or an inadequate response in terms of the tightness or depth of the market?

In this circumstance, another RFQ should be submitted. With an active RFQ, it is also permissible to contact potential counterparties (i.e. market makers), alert them to the RFQ and ask them to submit a market or to tighten/deepen the existing market. An RFQ is considered active for 60 seconds following submission. To ensure that such communications do not become prohibited pre-execution communications, only the information disclosed via the RFQ may be disclosed in such communications.

d) Is it permissible to contact other market participants to obtain general market color without violating the prohibition on pre-execution communications?

Communications to obtain general market color are permissible <u>provided there is no express or obviously implied arrangement to execute a specified trade and no non-public information is communicated regarding an order</u>.

e) If an order has been submitted on CME Globex, are there any restrictions on communicating with potential counterparties?

With a resting order exposed on CME Globex, it is permissible to contact potential counterparties to solicit interest in trading against the order. In any such communications, no non-public information (i.e. information not represented in the terms of the order exposed to the market) may be disclosed. For example, if the represented offer is for 250 contracts, it would be a violation of the rules to disclose that there are an additional 500 contracts to sell because that information has not been disclosed to the market.

6. <u>Crossing of Simultaneous Buy and Sell Orders That Do Not Involve Pre-Execution Communications and Trading Against Customer Orders on CME Globex</u>

a) What are the requirements for handling simultaneous buy and sell orders for different beneficial owners that did not involve pre-execution communications?
Independently initiated orders on opposite sides of the market for different beneficial account owners that are immediately executable against each other may be entered without delay provided that the orders did not involve pre-execution communications and that each of the orders is entered immediately upon receipt.

In accordance with Rule 533 ("Simultaneous Buy and Sell Orders for Different Beneficial Owners"), opposite orders for different beneficial accounts that are simultaneously placed by a party with discretion over both accounts may be entered provided that one order is exposed on CME Globex for a minimum of 5 seconds in the case of futures orders and a minimum of 15 seconds in the case of orders involving options.

An order allowing for price and/or time discretion, if not entered immediately upon receipt, may be knowingly entered opposite a second order entered by the same firm only if the second order has been entered immediately upon receipt and has been exposed on CME Globex for a minimum of 5 seconds for futures orders and a minimum of 15 seconds for orders involving options.

b) Assuming there have been no pre-execution communications, is it permissible for a firm to knowingly trade for its proprietary account against a customer order entered by the firm?
Yes, provided that in accordance with Rule 531 ("Trading Against Customers' Orders Prohibited") the customer order has been entered immediately upon receipt and has first been exposed on CME Globex for a minimum of 5 seconds for futures orders and a minimum of 15 seconds for orders involving options.

Questions regarding this advisory may be directed to the following individuals in Market Regulation:

Nancy Minett, Director, 212.299.2940

Robert Sniegowski, Associate Director, 312.341.5991

For media inquiries concerning this Advisory Notice, please contact CME Group Corporate Communications at 312.930.3434 or news@cmegroup.com.

CME & NYMEX Rule 539

PREARRANGED, PRE-NEGOTIATED AND NONCOMPETITIVE TRADES PROHIBITED

539.A. General Prohibition

No person shall prearrange or pre-negotiate any purchase or sale or noncompetitively execute any transaction, except in accordance with Sections B. and C. below.

539.B. Exceptions

The foregoing restriction shall not apply to block trades pursuant to Rule 526 or Exchange for Related Positions transactions pursuant to Rule 538.

539.C. Pre-Execution Communications Regarding Globex Trades

Parties may engage in pre-execution communications with regard to transactions executed on the Globex platform where one party (the first party) wishes to be assured that a contra party (the second party) will take the opposite side of the order under the following circumstances:

1. A party may not engage in pre-execution communications with other market participants on behalf of another party unless the party for whose benefit the trade is being made has previously consented to permit such communications.

2. Parties to pre-execution communications shall not (i) disclose to a non-party the details of such communications or (ii) enter an order to take advantage of information conveyed during such communications except in accordance with this rule.

3. In the case of futures orders, the first party's order must be entered into the Globex platform first and the second party's order may not be entered into the Globex platform until a period of 5 seconds has elapsed from the time of entry of the first order.

4. In the case of options orders, subsequent to the pre-execution communication, a Request for Quote ("RFQ") for the particular option or option spread or combination must be entered into Globex. Thereafter, a Request for Cross ("RFC") order which contains both the buy and the sell orders must be entered into Globex no less than fifteen (15) seconds and no more than thirty (30) seconds after the entry of the RFQ in order to proceed with the trade, except in equity options where the RFC order must be entered no less than five (5) seconds and no more than thirty (30) seconds after the entry of the RFQ. The RFQ and the RFC order must be entered within the same trading session. Failure to enter the RFC order within 30 seconds after the entry of the RFQ will require a new RFQ to be entered prior to the entry of the RFC order, which must be entered in accordance with the time parameters described above in order to proceed with the trade.

CBOT Rule 539

PREARRANGED, PRE-NEGOTIATED AND NONCOMPETITIVE TRADES PROHIBITED

539.A. General Prohibition

No person shall prearrange or pre-negotiate any purchase or sale or noncompetitively execute any transaction, except in accordance with Sections B. and C. below.

539.B. Exceptions

The foregoing restrictions shall not apply to block trades pursuant to Rule 526 or Exchange for Related Positions transactions pursuant to Rule 538.

539.C. Pre-Execution Communications Regarding Globex Trades in Interest Rate, Ethanol and Dow Options

Parties may engage in pre-execution communications with regard to Interest Rate, Ethanol and Dow options transactions executed on the Globex platform where one party wishes to be assured that a contra party will take the opposite side of the order under the following circumstances:

1. A party may not engage in pre-execution communications with other market participants on behalf of another party unless the party for whose benefit the trade is being made has previously consented to permit such communications.
2. Parties to pre-execution communications shall not (i) disclose to a non-party the details of such communications or (ii) enter an order to take advantage of information conveyed during such communications except in accordance with this rule.
3. Reserved.
4. Subsequent to the pre-execution communication, a Request for Quote ("RFQ") for the particular option or option spread or combination must be entered into Globex. Thereafter, a Request for Cross ("RFC") order which contains both the buy and the sell orders must be entered into Globex no less than fifteen (15) seconds and no more than thirty (30) seconds after the entry of the RFQ in order to proceed with the trade, except in equity options where the RFC order must be entered no less than five (5) and no more than thirty (30) seconds after the RFQ. The RFQ and the RFC order must be entered within the same trading session. Failure to enter the RFC order within 30 seconds after the entry of the RFQ will require a new RFQ to be entered prior to the entry of the RFC order, which must be entered in accordance with the time parameters described above in order to proceed with the trade.

Exhibit B

CME Group

A CME/Chicago Board of Trade/NYMEX Company

CME Group

Response to topics discussed in early March Financial Times articles by Hal Weitzman

March xx, 2010

Background - EFF

- [redacted]
- There has been virtually no end customer push to CME to set up and allow EFFs
- Timing of resolution is unknown

Exhibit C

CBOT Ex-Pit Transaction Fees (Per Side) - TOTAL	Product Category																	
Customer Type	Agricultural Products EFP	Agricultural Products EFR	Mini-sized Agricultural Futures EFP	Mini-sized Agricultural Futures EFR	Soybean Crush Options EFP	Soybean Crush Options EFR	ICSO & Calendar Spread Options EFP	ICSO & Calendar Spread Options EFR	OTC Ethanol Products	U.S. Treasury Futures	U.S. Treasury Options	Other Financial Futures	Other Financial Options	$25 Dow Futures	$10 Dow Futures	$10 Dow Options	Mini-sized $5 Dow Products	DJ U.S. Real Estate Products
Individual Members Trading Their Own Account	$0.90	$1.40	$0.87	$1.37	$1.35	$1.85	$0.99	$1.49	$1.75	$0.86	$0.86	$1.36	$1.36	$1.56	$1.36	$1.36	$1.36	$1.36
Individual Delegates Trading Their Own Account	$1.05	$1.55	$1.02	$1.52	$1.50	$2.00	$1.29	$1.79	$1.75	$1.01	$1.01	$1.51	$1.51	$1.71	$1.51	$1.51	$1.51	$1.51
Equity Members (Individual Equity Members, Clearing Firms and Equity Firms)	$0.90	$1.40	$0.87	$1.37	$1.35	$1.85	$0.99	$1.49	$1.75	$0.86	$0.86	$1.36	$1.36	$1.56	$1.36	$1.36	$1.36	$1.36
Rule 106.S. Family of Funds Equity Member Firms	$0.90	$1.40	$0.87	$1.37	$1.35	$1.85	$0.99	$1.49	$1.75	$0.86	$0.86	$1.36	$1.36	$1.81	$1.36	$1.36	$1.51	$1.51
Individual Non-Equity Members (other member or delegate executing the trade); Rule 106.H. Corporate Trading Firms; Rule 106.H. Trading FCMs; & Rule 106.I. Affiliate Trading Member Firms	$1.01	$1.51	$1.01	$1.51	$1.41	$1.91	$1.21	$1.71	$1.75	$1.01	$1.01	$1.56	$1.56	$2.01	$1.56	$1.56	$1.55	$1.55
Individual Delegates (other member or delegate executing the trade) & Rule 106.I. Affiliate Trading Member Firms	$1.16	$1.66	$1.16	$1.66	$1.56	$2.06	$1.51	$2.01	$1.75	$1.16	$1.16	$1.59	$1.59	$2.06	$1.59	$1.71	$1.74	$1.74
Rule 106.S. Family of Funds Trading Member Firms	$1.01	$1.51	$1.01	$1.51	$1.41	$1.91	$1.21	$1.71	$1.75	$1.01	$1.01	$1.56	$1.56	$2.01	$1.56	$1.56	$1.55	$1.55
Rule 106.R. Electronic Corporate Member Firms	$1.41	$1.91	$1.21	$1.71	$6.81	$7.31	$2.01	$2.51	$1.75	$1.21	$1.31	$1.61	$1.81	$2.81	$1.61	$1.81	$2.39	$2.39
International Incentive Program; Asian Incentive Program; South American Incentive Program & Latin American Fund Manager Incentive Program	$1.41	$1.91	$1.21	$1.71	$6.81	$7.31	$2.01	$2.51	$1.75	$1.21	$1.31	$1.61	$1.81	$2.81	$1.61	$1.81	$2.39	$2.39
Non-Members	$1.41	$1.91	$1.21	$1.71	$6.81	$7.31	$2.01	$2.51	$1.75	$1.21	$1.31	$1.61	$1.81	$2.81	$1.61	$1.81	$2.39	$2.39

Breakdown of Fee Types:

CME Ex-Pit Transaction Fees (Per Side) - Clearing Fee	Product Category																	
Customer Type	Agricultural Products EFP	Agricultural Products EFR	Mini-sized Agricultural Futures EFP	Mini-sized Agricultural Futures EFR	Soybean Crush Options EFP	Soybean Crush Options EFR	ICSO & Calendar Spread Options EFP	ICSO & Calendar Spread Options EFR	OTC Ethanol Products	U.S. Treasury Futures	U.S. Treasury Options	Other Financial Products	Other Financial Options	$25 Dow Futures	$10 Dow Futures	$10 Dow Options	Mini-sized $5 Dow Products	DJ U.S. Real Estate Products
All	$0.06	$0.06	$0.06	$0.06	$0.06	$0.06	$0.06	$0.06	$0.00	$0.06	$0.06	$0.06	$0.06	$0.06	$0.06	$0.06	$0.06	$0.06

CME Ex-Pit Transaction Fees (Per Side) - Exchange Fee	Product Category																	
Customer Type	Agricultural Products EFP	Agricultural Products EFR	Mini-sized Agricultural Futures EFP	Mini-sized Agricultural Futures EFR	Soybean Crush Options EFP	Soybean Crush Options EFR	ICSO & Calendar Spread Options EFP	ICSO & Calendar Spread Options EFR	OTC Ethanol Products	U.S. Treasury Futures	U.S. Treasury Options	Other Financial Products	Other Financial Options	$25 Dow Futures	$10 Dow Futures	$10 Dow Options	Mini-sized $5 Dow Products	DJ U.S. Real Estate Products
Individual Members Trading Their Own Account	$0.09	$0.09	$0.06	$0.06	$0.54	$0.54	$0.18	$0.18	$0.00	$0.05	$0.05	$0.05	$0.05	$0.25	$0.05	$0.05	$0.05	$0.050
Individual Delegates Trading Their Own Account	$0.24	$0.24	$0.21	$0.21	$0.69	$0.69	$0.48	$0.48	$0.00	$0.20	$0.20	$0.20	$0.20	$0.40	$0.20	$0.20	$0.20	$0.20
Equity Members (Individual Equity Members, Clearing Firms and Equity Firms)	$0.09	$0.09	$0.06	$0.06	$0.54	$0.54	$0.18	$0.18	$0.00	$0.05	$0.05	$0.05	$0.05	$0.25	$0.05	$0.05	$0.05	$0.05
Rule 106.S. Family of Funds Equity Member Firms	$0.09	$0.09	$0.06	$0.06	$0.54	$0.54	$0.18	$0.18	$0.00	$0.05	$0.05	$0.05	$0.05	$0.50	$0.05	$0.05	$0.20	$0.20
Individual Non-Equity Members (other member or delegate executing the trade); Rule 106.H. Corporate Trading Firms; Rule 106.H. Trading FCMs; & Rule 106.I. Affiliate Trading Member Firms	$0.20	$0.20	$0.20	$0.20	$0.60	$0.60	$0.40	$0.40	$0.00	$0.20	$0.20	$0.25	$0.25	$0.70	$0.25	$0.25	$0.24	$0.24
Individual Delegates (other member or delegate executing the trade) & Rule 106.I. Affiliate Trading Member Firms	$0.35	$0.35	$0.35	$0.35	$0.75	$0.75	$0.70	$0.70	$0.00	$0.35	$0.35	$0.28	$0.28	$0.75	$0.28	$0.40	$0.43	$0.43
Rule 106.S. Family of Funds Trading Member Firms	$0.20	$0.20	$0.20	$0.20	$0.60	$0.60	$0.40	$0.40	$0.00	$0.20	$0.20	$0.25	$0.25	$0.70	$0.25	$0.25	$0.24	$0.24
Rule 106.R. Electronic Corporate Member Firms	$0.60	$0.60	$0.40	$0.40	$6.00	$6.00	$1.20	$1.20	$0.00	$0.40	$0.50	$0.30	$0.50	$1.50	$0.30	$0.50	$1.08	$1.08
International Incentive Program; Asian Incentive Program; South American Incentive Program & Latin American Fund Manager Incentive Program	$0.60	$0.60	$0.40	$0.40	$6.00	$6.00	$1.20	$1.20	$0.00	$0.40	$0.50	$0.30	$0.50	$1.50	$0.30	$0.50	$1.08	$1.08
Non-Members	$0.60	$0.60	$0.40	$0.40	$6.00	$6.00	$1.20	$1.20	$0.00	$0.40	$0.50	$0.30	$0.50	$1.50	$0.30	$0.50	$1.08	$1.08

CME Ex-Pit Transaction Fees (Per Side) - Ex-Pit Surcharge	Product Category																	
Customer Type	Agricultural Products EFP	Agricultural Products EFR	Mini-sized Agricultural Futures EFP	Mini-sized Agricultural Futures EFR	Soybean Crush Options EFP	Soybean Crush Options EFR	ICSO & Calendar Spread Options EFP	ICSO & Calendar Spread Options EFR	OTC Ethanol Products	U.S. Treasury Futures	U.S. Treasury Options	Other Financial Products	Other Financial Options	$25 Dow Futures	$10 Dow Futures	$10 Dow Options	Mini-sized $5 Dow Products	DJ U.S. Real Estate Products
All	$0.75	$1.25	$0.75	$1.25	$0.75	$1.25	$0.75	$1.25	$1.75	$0.75	$0.75	$1.25	$1.25	$1.25	$1.25	$1.25	$1.25	$1.25